

15-1724

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

JANE DOE NO. 1, JANE DOE NO. 2, and JANE DOE NO. 3, a minor child, by
her parents and next friends SAM LOE and SARA LOE,

Plaintiffs-Appellants

v.

BACKPAGE.COM, LLC, CAMARILLO HOLDINGS, LLC (f/k/a VILLAGE
VOICE MEDIA HOLDINGS, LLC), and NEW TIMES MEDIA, LLC,

Defendants-Appellees

**On Appeal from the United States District Court
for the District of Massachusetts (14-cv-13870-RGS)**

BRIEF FOR THE APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs are natural persons. As such, a corporate disclosure statement is not required. Fed. R. App. P. 26.1(a).

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

This case presents important questions of law, essentially of first impression in this circuit, concerning whether the Communications Decency Act, 47 U.S.C. § 230, precludes a child sex trafficking victim from suing a website operator based on allegations that the operator has engaged in an intentional course of conduct that violates state and federal criminal laws prohibiting the sexual exploitation of children. Last month, in a case also involving these Defendants, the Washington Supreme Court addressed some of these same questions, resolving them in the exact *opposite* direction as the District Court did below. Plaintiffs respectfully submit that oral argument will aid the Court in its resolution of the questions of law that this appeal presents.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over Plaintiffs’ federal statutory claims pursuant to 28 U.S.C. §§ 1331 and 1338(a), and their pendant state claims under both 28 U.S.C. §§ 1332 and 1367. The District Court entered a final judgment disposing of all of Plaintiffs’ claims on May 15, 2015. Add.35.¹ Plaintiffs filed their timely notice of appeal on June 15, 2015. App.261. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

¹ Throughout this brief, “Add.” refers to the attached Addendum and “App.” refers to the Appendix filed herewith.

ISSUES PRESENTED

1. Whether Plaintiffs' sex trafficking and unfair and deceptive business practices claims involving affirmative unlawful conduct, as pled, "treat" Backpage as the mere "publisher or speaker" of unlawful advertisements created by "another" and thus implicate the federal Communications Decency Act's "Good Samaritan" provision, 47 U.S.C. § 230(c).

2. Whether Plaintiffs' claim under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595(a), a federal criminal statute that includes a private right of action, constitutes the "enforcement of" federal criminal law and, therefore, is expressly excepted from the Communications Decency Act's "Good Samaritan" provision, *see* 47 U.S.C. § 230(e)(1).

3. Whether the District Court erred in concluding, on a motion to dismiss, that Plaintiffs' claim under Massachusetts General Laws Chapter 93A did not sufficiently allege causation, where the complaint alleges in detail that Plaintiffs were injured by Backpage's concerted, intentional misrepresentations and the resulting growth in both the total online sex trafficking market and Backpage's share of that market.

4. Whether the District Court erred in dismissing on the pleadings Plaintiffs' right of publicity claims based on a determination that they allege merely incidental use of Plaintiffs' photographs, even though the claims arise from

Backpage's nonconsensual use of exploitative photographs of Plaintiffs for advertising and trade purposes in order to enhance the allure and, therefore, the profitability to Backpage of the classified advertisements that unlawfully held Plaintiffs out for sale.

5. Whether the District Court erred in dismissing on the pleadings Plaintiff Jane Doe No. 3's copyright claim without addressing the merits and without considering (i) her request for the remedy of injunctive relief, or (ii) whether a fully developed factual record could support an award of actual damages.

STATEMENT OF THE CASE

Plaintiffs are three girls who suffered severe physical and psychological injuries as a result of being trafficked for sex, while minors and against their wills, on the sex trade “classified advertisement” website Backpage.com. Defendants (hereinafter “Backpage”) are the owners and operators of Backpage.com. Plaintiffs’ second amended complaint (hereinafter “Complaint”) alleged that, in violation of federal and state laws, Backpage engaged in a systematic, clandestine, and purposeful course of conduct to encourage, profit from, and shield from scrutiny the unlawful advertisements that offered Plaintiffs for sale for sex. The Complaint also alleges that Backpage violated Plaintiffs’ intellectual property rights by using their pictures without their consent. Without questioning the plausibility of the principal allegations, the District Court (Stearns, J.) nevertheless dismissed Plaintiffs’ Complaint with prejudice in its entirety.

A. Factual Background

1. Introduction.

Backpage.com is a sophisticated online marketplace for illegal commercial sex. Each day, across the country, many thousands of advertisements are posted in the “Escorts” section of Backpage.com. Almost all of these advertisements are for illegal sex. *See Backpage.com, LLC v. Dart*, No. 15 C 063460, 2015 WL 5174008, at *12 (N.D. Ill. Aug. 24, 2015) (finding that, at the very least, “a substantial majority of [Backpage’s escort] ads are ‘exhortations to illegal conduct,’” *id.* at

*12 n.11, and “are connected to human trafficking,” *id.* at *12). A substantial portion of these advertisements, moreover, involve children, including advertisements of the Plaintiffs in this case, who were sold for sex on Backpage.com beginning at age 15. The exploitation of children through Backpage.com results from a business model that generates enormous profits from knowingly participating with and aiding traffickers in the sexual exploitation of children. Backpage has sustained this business model through a series of actions set forth in the Complaint that have protected the anonymity of traffickers advertising on the website, enhanced the utility of the website as the most advantageous option for traffickers, and expanded the market for advertisements for illegal sex with children and others while deceiving law enforcement and nonprofit organizations.

2. *The Emergence of Backpage.com as the Dominant Player in the Online Commercial Sex Trade.*

Backpage.com takes its name from the infamous “Back Page” of the Village Voice newspaper, whose back pages were known to contain classified advertisements for commercial sex. Indeed, until 2012, Defendant Camarillo Holdings LLC (then known as Village Voice Media) owned the Village Voice. Over the past decade or more, marketing for prostitution services has migrated to the Internet, with Backpage.com now accounting for 80 percent or more of online commercial sex advertising in the United States, involving thousands of

advertisements daily in each of 394 geographic areas. Moreover, it is estimated that tens of thousands of children are trafficked for sex annually in the United States, mostly through the Internet. Of these exploited children, the vast majority are advertised on Backpage.com. App.22-23.

3. *The Market Share Growth Scheme.*

The dominance of Backpage in the online sex trade is a relatively recent development. In 2010, in part due to concerns regarding child exploitation on its website, Craigslist (which had been the market leader in illegal online commercial sex advertising) voluntarily shut down its Adult Services category. To capitalize on this development, Backpage initiated a scheme to minimize public scrutiny of its business, particularly the exploitation of children, while it undertook to expand its market share to become the dominant presence in the commercial sex trafficking business. App.18, 24.

In furtherance of this scheme, Backpage undertook to forge seemingly cooperative relationships with law enforcement agencies and nonprofits, such as the National Center for Missing & Exploited Children (“NCMEC”), the leading organization in the country working with law enforcement, families, and the professionals who serve them on issues related to missing and sexually exploited

children.² Backpage provided assurances to these organizations that it was dedicated to being the “sheriff” of the Internet, devoted to defeating the “scourge” of online child sex trafficking. Specifically, Backpage promised to be vigilant in attempting to detect sex trafficking of minors, to increase reporting of suspicious advertisements, to develop and adopt analytical techniques to detect advertising of children, and to be a model of cooperation with law enforcement. With these representations, Backpage induced NCMEC and others to make public statements supportive of Backpage during the critical period following the closure of Craigslist’s Adult Services category. App.25-26.

Contrary to these representations, Backpage intended only to engage in superficial efforts to work with these agencies, and only to the extent necessary to divert their attention from its growing market share and business success. Backpage has not adopted known techniques or technologies to detect child sex trafficking, nor adopted other best practices discussed with NCMEC and others, and it has selectively reported advertisements that Backpage knew were unlikely to involve child sex trafficking victims. App.19, 26-29. Its reporting was unfair and deceptive in other ways as well. For example, if Backpage receives an external report that an advertisement in a particular city involves a child, Backpage will

² See *About Us*, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, <http://www.missingkids.com/About> (last visited Sept. 11, 2015).

consider removing the advertisement in that city and reporting the advertisement to NCMEC. However, Backpage takes no steps to remove or report other advertisements for the same child, including even identical advertisements that are posted in other geographical regions; nor do they identify or report other advertisements involving the same phone number, web address, or other identifying information indicative of trafficking of children. App.26-28. Indeed, Backpage does not even consistently remove advertisements when parents report their minor children are pictured in the advertisements. This happened to Plaintiff Jane Doe No. 3 when her parents asked that Backpage remove her photograph from Backpage.com. *See infra* p.16.

While it eventually became clear that the various representations by Backpage were simply a diversion to enable Backpage to solidify its market position, the damage had been done. Because Backpage protected the ability of traffickers to advertise children for sex, and thus enhanced its reputation among traffickers as a “safe” and favorable place to advertise sex trafficking victims, it became the dominant player in the online commercial sex trade. The evolving success of Backpage directly contributed to a significant growth in demand for online illegal commercial sex, resulting in a substantial increase in the number of advertisements on Backpage.com and a corresponding increase in the number of children exploited through the website. App.29.

4. *The Business Model Supporting the Success of Backpage.*

Backpage designed its website to maximize the perception among traffickers that Backpage.com is the most advantageous venue for the online advertising of illegal commercial sex. Backpage.com includes an advertisement category conspicuously labeled “Adult Entertainment,” which includes a number of subcategories, one of which is “Escorts.” Backpage knows that customers understand that the “Escorts” subcategory is where they will find offers of sex in exchange for money. Backpage monitors this category and removes advertisements from the website that would undermine its effectiveness as a marketplace for traffickers, including advertisements by law enforcement running “sting” operations and by victim-protection organizations. App.29-32.

Backpage understands that the success of its business model depends on the perceived advantages the website presents to traffickers seeking to avoid detection by law enforcement. Thus, Backpage actively assists traffickers by various means to avoid detection and complete illegal transactions, including:

- (i) Backpage does not require advertisers in its “Escorts” section to provide any identifying information about the person placing the advertisement (the “poster”) or the subject of the advertisement. Backpage

also allows users to pay for advertisements using prepaid credit cards,³ making these transactions difficult to track in the absence of a name, address, or any other identifying information. Moreover, Backpage now accepts Bitcoin as payment. Bitcoin is a digital currency that is likewise difficult to track because transactions are completed without a bank. App.35.

(ii) Backpage does not require those posting in the “Escorts” section to include a phone number. If a phone number is included, Backpage allows the use of obscured forms that include letters and numbers rather than strictly numeric characters (*e.g.*, “twoO13fourFive678niNe” rather than “201-345-6789”). In contrast, Backpage does require a numerical phone number from posters in the Pets section. The use of obscured phone numbers is well understood as a signal to prospective customers that the individual in the advertisement is being sold for sex. App.36.

(iii) Backpage does not require posters in the “Escorts” section to verify their email addresses. Backpage offers to “hide” the advertiser’s email address and then offers a menu of options to the advertiser to privately

³ In recognition of the widespread illegality on Backpage.com, the major credit card companies (American Express, Visa, and Mastercard) recently terminated access by Backpage to their payment services. In the aftermath of the terminations, Backpage has made some changes to its approach. *See Dart*, 2015 WL 5174008, at *4-5, *11.

facilitate and manage communications with the customer responding to the advertisement and seeking to purchase sex. App.36-37.

(iv) Backpage also makes it difficult to track photographs that accompany advertisements. When uploaded, photographs are embedded with “metadata,” which is identifying information that typically reflects the date, time, geolocation, and other critical information about the photograph. Backpage deliberately adjusted its server software to delete the metadata on each uploaded photo to impede law enforcement from tracking the photograph or determining whether photographs with the same metadata are posted elsewhere on Backpage.com. App.37-38

In addition to assisting traffickers to avoid detection and complete transactions, Backpage makes no effort to block advertisements that exhibit signs that a child is being trafficked for sex, and indeed even takes some steps to “coach” advertisers on how to submit an advertisement for a child sex trafficking victim. For example, it is well known that traffickers often require an exploited child to post the advertisement on Backpage.com, but Backpage does not require age verification to post in the “Escorts” section. While a poster must enter his or her age before posting, if the poster enters an age under 18, he or she receives a message that reads: “Oops! Sorry, the ad poster must be over 18 years of age.” Instead of blocking the poster, Backpage offers the opportunity to simply enter a

different age. No matter how many times the poster has entered an age under 18, the poster has the option to enter an age above 18, but to otherwise use the same information entered previously for the rest of the advertisement. App.35-36.

Likewise, if a poster attempts to include any non-permitted terms in an advertisement—such as “teenage” or “schoolgirl”—he or she receives this message: “Oops! The term ‘___’ is forbidden in this category.” Backpage does not, however, block the poster, no matter what the import of the non-permitted term or how many times the poster has attempted to use it. Rather, Backpage allows the poster to delete or alter the offending term and once again elect to “Continue.” Backpage also allows an advertiser to include synonyms and misspellings of non-permitted terms that indicate an underage victim, such as “brly legal.” This process encourages traffickers to advertise sexual services and exploit child trafficking victims without including the terms most likely to garner attention from law enforcement. App.39-41.

The “Escorts” subcategory has been extremely lucrative for Backpage. While advertisers of goods or services unrelated to adult services are permitted to post advertisements without charge, Backpage charges a fee in its “Adult Entertainment” category. As of the date of the Complaint, the charge to place an advertisement in the “Escorts” section was \$12.00 in most geographic areas,

including Boston and the surrounding metropolitan region, though Backpage charged up to \$17.00 per advertisement in parts of New York City. App.33.

5. *The Trafficking of Plaintiffs Through Backpage.com.*

Jane Doe No. 1 was trafficked across Massachusetts and Rhode Island exclusively on Backpage.com, beginning when she was 15 years old. She was sold and raped 10-12 times per day by men responding to the advertisements. Jane Doe No. 1 estimates that she was raped over 1000 times. App.46.

At the direction of her trafficker, Jane Doe No. 1 used a pre-paid mobile phone to post advertisements on Backpage.com, reposting the ads multiple times each day, and providing the same pre-paid mobile phone number for customers to contact her. The trafficker instructed her to use terminology such as “roses” to refer to money, and to use letters and symbols in addition to numbers in her telephone number. When Jane Doe No. 1 attempted to put her actual age into Backpage.com she received the “Oops!” message and was then ordered by her pimp to enter an age over 18. Jane Doe No. 1’s trafficker also required her to simultaneously post advertisements on Backpage.com in multiple cities. By posting advertisements in different cities, the trafficker was able to maximize the number of customers willing to purchase sex. The advertisements offering Jane Doe No. 1 included photographs of parts of her body, and on at least one occasion, the photographs included certain tattoos which were unique to her. App.47-50.

Beginning at the age of 15, Jane Doe No. 2 was trafficked across Massachusetts on Backpage.com. During various periods from 2010 through 2012, she was advertised an average of 6 times per day and was sold to between 5-15 customers a day, seven days a week. Jane Doe No. 2 was raped over 900 times as a result of the advertisements placed on Backpage.com. App.50-51.

The advertisements offering Jane Doe No. 2 were posted exclusively on Backpage.com by either the trafficker or another female with whom he worked. One of them paid for the advertisements using stolen credit cards or pre-paid credit cards that they purchased at convenience stores. Jane Doe No. 2 was given a pre-paid mobile phone for customer calls, which began almost immediately after the ads were posted on Backpage.com. The advertisements typically included one or more photographs, displaying Jane Doe No. 2's shoulders, legs, buttocks and/or breasts. App.51-52.

Jane Doe No. 3 was trafficked in Massachusetts on Backpage.com in 2013 when she was 15 years old. While at her friend's home, Jane Doe No. 3 was picked up by a man and a woman. At an apartment in Boston where Jane Doe No. 3 was taken, the traffickers used a pre-paid, anonymous debit card to pay for the advertisements on Backpage.com. The headlines for the advertisements contained words such as "new," "sweet," and "playful," all known code words for minors. After the advertisements were placed on Backpage.com, Jane Doe No. 3 started

receiving calls and texts from men who wanted to purchase her for sex. The traffickers drove Jane Doe No. 3 to a hotel in Foxborough, Massachusetts, where she was raped in exchange for payment that went to her trafficker. App.52-54.

The advertisements posted on Backpage.com offering Jane Doe No. 3 included several photographs. Jane Doe No. 3 was the photographer of some of the photographs that were displayed in the advertisements. The photographs displayed her shoulders, legs, buttocks, and/or breasts. Subsequent to being trafficked, Jane Doe No. 3 obtained a registered copyright in one of these photographs. App.53, 61.

Shortly after Jane Doe No. 3 began being trafficked on Backpage.com, her parents Sam and Sara Loe found advertisements for their daughter on the website under the “Escorts” section in the Adult Entertainment category for Massachusetts. Sam and Sara Loe twice emailed Backpage to report that a 15-year-old was being illegally offered for sale on Backpage.com. They provided Backpage with information that would allow it to easily locate and remove all advertisements involving Jane Doe No. 3 and demanded that Backpage remove the advertisements immediately. A week later, the advertisements for Jane Doe No. 3 remained on Backpage.com. App.53-54.

B. Procedural History

Plaintiffs filed suit in the District of Massachusetts in October 2014, App.5, asserting that Backpage had engaged in criminal conduct that triggered private rights of action under the federal Trafficking Victims Protection Reauthorization Act (“TVPRA”), 18 U.S.C. § 1591-1595, and the Massachusetts Anti-Trafficking Act (“MATA”), Mass. Gen. Laws ch. 265, § 50, by means of its “participation in” and “aid” of sex trafficking ventures. App.54-57.

The TVPRA, originally enacted in 2000 as the Trafficking Victims Protection Act, was reauthorized in 2003, 2005, 2008, 2011, and 2013. The statute imposes severe penalties on any person who, *inter alia*, knowingly engages in trafficking of a child for the purpose of causing the child to engage in “a commercial sex act.” 18 U.S.C. § 1591(a). The TVPRA extends criminal liability to those who “benefit[], financially or by receiving anything of value, from participation in [the underlying sex trafficking] venture” 18 U.S.C. § 1591(a)(2). The statute also provides victims of sex trafficking ventures with a private right of action against any person who “knowingly benefits financially ... from participation in [the underlying sex trafficking] venture.” 18 U.S.C. § 1595(a).

The MATA was enacted in 2011. Like its federal analog, the MATA not only includes criminal penalties, but also provides victims with a private right of

action. Under the MATA's private right of action, a victim is entitled to sue not only the individuals who forced her to engage in commercial sex, but also "[a]ny business entity that knowingly aid[ed]" the venture that trafficked her "for sexual servitude." Mass. Gen. Laws ch. 265, § 50(d).

In addition to the trafficking claims, Plaintiffs made a claim under Massachusetts General Laws Chapter 93A based on Backpage's unfair and deceptive business scheme to grow market share in the illegal sex trade. App.57-59. Plaintiffs also made claims arising from the unauthorized use of their photographic images posted on Backpage.com. Plaintiffs each advanced a right of publicity claim under Massachusetts General Laws Chapter 214, § 3A. Jane Doe No. 1 also alleged unauthorized use for commercial purposes of photographic images of her in violation of Rhode Island General Laws § 9-1-28. App.59-60. Jane Doe No. 3 alleged infringement of her rights in a registered, copyrighted photograph in violation of the Copyright Act, 17 U.S.C. § 101 *et seq.* App. 60-62.

Backpage moved to dismiss the Complaint, relying primarily on Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, as a defense against Plaintiffs' claims. App.65. Backpage argued that it was entitled to immunity under Section 230(c)(1), which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Amicus curiae*

briefs were filed in support of both parties. App.69, 92, 117. On May 15, 2015, the District Court dismissed Plaintiffs' Complaint in its entirety, with prejudice. Add.1-35.

C. The District Court's Errors of Law

The District Court's dismissal of Plaintiffs' Complaint was erroneous as a matter of law.

First, in dismissing Plaintiffs' trafficking and Chapter 93A claims pursuant to Section 230(c)(1) of the CDA, the District Court essentially ignored the analytical framework that this Court set forth in *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007). Where the defendant is an "Internet service provider," *Lycos's* framework requires a court to determine whether the *particular factual allegations* on which the plaintiff's claim is based "treat" the defendant "as the publisher or speaker" of "information" provided by a third party. *Id.* at 418; *see also* 47 U.S.C. § 230(c)(1). If the answer is no, then Section 230(c)(1) does not bar the claim.

In the proceedings below, Plaintiffs argued that Section 230(c)(1) did not bar their federal and state sex trafficking claims or their state unfair and deceptive business practices claim because those claims are based on allegations that Backpage knowingly and intentionally engaged in a highly unusual course of affirmative conduct, including in violation of federal and state criminal law, for the

purpose of ensuring that Backpage.com is an attractive, profitable, and hospitable online bazaar where traffickers can sell individuals, including children, for sex. Rather than adhere to *Lycos*'s analytical framework, however, the District Court relegated to a footnote any discussion of the "treat as a publisher" element of the statute, and that footnote failed to address either *Lycos* or any of Plaintiffs' arguments. Add.17. The District Court instead focused its discussion of Section 230(c)(1) almost entirely on arguments raised by *amici* that Backpage should be considered the (or at least a) creator of the unlawful commercial sex advertisements that populate Backpage.com, Add.12-15—arguments that Plaintiffs told the District Court they were reserving until a more complete record could be developed. App.236.

Second, the District Court erred in concluding that Plaintiffs' TVPRA claim does not fall within the statutory exception in Section 230(e)(1) of the CDA providing that "[n]othing in [the CDA] shall be construed to impair the enforcement of ... any ... Federal criminal statute." Plaintiffs' federal sex trafficking claim falls within this exception: the TVPRA is a criminal statute housed in Title 18 of the United States Code, and a civil action brought under the statute's private right of action provision is part of the statute's overall "enforcement" scheme. Rather than adhere to Section 230(e)(1)'s plain language, however, the District Court erroneously concluded that the statutory phrase

“*enforcement* of ... any ... Federal criminal statute” should include only criminal *prosecutions*. Add.22.

Third, regarding the Chapter 93A claim, the District Court failed to address the actual basis of the claim, which arises from Backpage’s unfair and deceptive, and ultimately successful, scheme to grow market share to become the dominant player in the online sex business. Backpage accomplished this scheme by making a number of misrepresentations to key stakeholders, which, in turn, substantially increased the incidence of child sex trafficking and the risk of harm to Plaintiffs. The District Court held that Section 230 barred the claim because it rested on the structure and design of Backpage.com and on Backpage’s knowledge or tacit encouragement of illegal content—bases that, according to the court, would be inconsistent with Section 230. Add.25-27. But Plaintiffs’ claim did not rest on these bases at all. In addition, the District Court concluded that Plaintiffs’ theory of causation was “too speculative to fall as a matter of law within the penumbra of reasonably [sic] foreseeability” Add.25, without carefully considering Plaintiffs’ allegations that went to causation.

Finally, as to Plaintiffs’ right of publicity claims, the District Court improperly assumed, contrary to the Complaint’s allegations, that Backpage did not profit from, and only “incidentally” benefitted from, the nonconsensual publication on Backpage.com of exploitative photographs of Plaintiffs in paid

advertisements. Add.30. The court dismissed the claims despite allegations that Backpage’s use of photographic images to enhance the effectiveness of advertisements is deliberate and “an integral part of [Backpage’s] business model.” App.59. In addition, in dismissing Jane Doe No. 3’s copyright claim, the District Court failed to analyze the substantive merits of the claim, ignored her request for injunctive relief despite that the Copyright Act expressly authorizes such relief, and erroneously held that she had failed to plead any redressable damages from the infringement of her copyright. Add.31-33.

SUMMARY OF ARGUMENT

1. The CDA’s “Good Samaritan” provision does not preclude Plaintiffs’ claims under the federal and state trafficking statutes and Massachusetts General Laws Chapter 93A. The plain language of Section 230(c)(1) bars only those claims that seek to “treat” an internet service provider (“ISP”), such as Backpage, as the “publisher or speaker” of content that was created entirely by “another.” Construing this provision in *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007), this Court explained that a website operator is shielded from liability where the plaintiff’s claim seeks to “input[e]” to the website operator unlawful content that another party created and over which the website operator merely exercised traditional “editorial decision[s].” Here, by contrast, Plaintiffs’ claims are premised on allegations that, preceding the publication of the advertisements that offered Plaintiffs for sale, Backpage engaged in a systematic effort to encourage the rampant proliferation of illegal advertisements for sex on Backpage.com, which included lying to law enforcement, impeding the detection and identification of sex traffickers and the victims they exploit, and instructing sex traffickers on how to create advertisements that would simultaneously entice customers interested in sexually exploiting children yet evade public scrutiny. The trafficking and Chapter 93A claims, therefore, rest on

affirmative conduct by Backpage that places the claims comfortably outside the boundaries of the “treat as publisher” limitation of Section 230.

2. Even if Plaintiffs’ TVPRA claim fell under Section 230(c)—which it does not—it should nonetheless survive dismissal under Section 230(e)(1), which provides that the CDA shall not “be construed to impair the enforcement of ... any ... Federal criminal statute.” 47 U.S.C. § 230(e)(1). The TVPRA is a federal criminal statute containing a civil remedy as an integral part of its enforcement scheme. The “enforcement” of criminal laws often includes civil actions that support and reinforce criminal provisions of the same or related statutes, and limiting the term “enforcement” to only government prosecutions is not faithful to the plain language of the statute.

3. Plaintiffs plausibly pled that Backpage’s unfair and deceptive conduct, in violation of Chapter 93A, was both the actual and the proximate cause of Plaintiffs’ injuries. Backpage engaged in a systematic effort, through misrepresentations to various agencies coupled with a concerted effort to support traffickers, to expand the market for sex trafficking, knowing that a higher number of children would be trafficked as a result. This scheme allowed Backpage to dominate the online illegal sex market, which increased the risk of harm to Plaintiffs, who then were injured in fact when they were sold repeatedly through the marketplace created by Backpage. Such market effects are recognized as

sufficient to show factual causation under Chapter 93A and similar statutes. In addition, because Backpage foresaw its conduct would increase the frequency of child sex trafficking on its website, its conduct also was the proximate cause of Plaintiffs' injuries.

4. Massachusetts General Laws Chapter 214, § 3A and Rhode Island General Laws § 9-1-28 broadly protect a person's interest in "not having the commercial value of one's name, portrait or picture appropriated to the benefit of another." *Tropeano v. Atl. Monthly Co.*, 379 Mass. 745, 400 N.E.2d 847, 850 (1980). Plaintiffs allege that photographs of them were included with each advertisement offering them for sale on Backpage.com, for which Backpage charged a fee. Before the advertisements were posted, Backpage reviewed and made the affirmative decision whether to display each photograph, and the use of the approved photographs enhanced the effectiveness of these advertisements. Rather than an incidental use, the photographs are integral to the Backpage business model, and their use violated Plaintiffs' rights under the applicable statutes.

5. Plaintiff Jane Doe No. 3 makes a plausible claim for damages and injunctive relief for infringement of her registered, copyrighted photograph. As to damages, the Complaint alleges that the display of photographs is "an integral part" of Backpage's business model, and that Backpage profited from its infringing

use of Jane Doe No. 3's copyrighted work. App.59-62. In addition, the claim plainly warrants injunctive relief, a remedy explicitly available under the Copyright Act. Absent an injunction, she has no recourse to prevent Backpage from displaying or continuing to display her copyrighted photograph.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the District Court’s construction and application of the CDA. *See Town of Johnston v. Fed. Hous. Fin. Agency*, 765 F.3d 80, 83 (1st Cir. 2014). This Court also reviews *de novo* the District Court’s decision to dismiss Plaintiffs’ Complaint. *See Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 7 (1st Cir. 2011).

II. SECTION 230(C) OF THE CDA DOES NOT BAR PLAINTIFFS’ TRAFFICKING AND CHAPTER 93A CLAIMS

A. *Lycos* Provides the Definitive Framework for Resolution of the CDA Issues

This Court’s decision in *Lycos* provides the legal framework necessary to resolve the CDA issues presented in this appeal. Section 230(c)(1) of the CDA provides: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). As *Lycos* explained, this provision has three discrete elements that a defendant must satisfy in order to demonstrate that it is entitled to protection: “(1) [defendant] is a ‘provider or user of an interactive computer service’; (2) the claim is based on ‘information provided by another

information content provider’; and (3) the claim would treat [defendant] ‘as the publisher or speaker’ of that information.”⁴ *Lycos*, 478 F.3d at 418.

Lycos involved state law securities and cyberstalking claims concerning allegedly false information about the plaintiff company that was posted on an online message board. While the *Lycos* court addressed all three elements necessary for a defendant to invoke Section 230(c)(1), the core issue there was whether Lycos, an internet message-board operator, was responsible for the alleged misinformation that third parties had posted. The court held that Lycos, an ISP, was not responsible for the message board content that was entirely written and posted by third parties, where there was not “even a colorable argument that any misinformation was prompted by [the website’s] registration process or its link structure.” 478 F.3d at 420. The claims rested solely on factual allegations that sought to “input[e]” the third-party message board speech to Lycos—“that is, on treating [Lycos] as the publisher of that information.” *Id.* at 421-422. In other words, the plaintiffs had failed to allege any conduct other than the message board

⁴ Though some courts have referred to Section 230(c)(1) as providing “immunity” to ISPs, *see, e.g., Lycos*, 478 F.3d at 415, the statute merely provides an affirmative defense, not immunity from suit itself. *See Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (explaining that Section 230(c)(1) is an affirmative defense that can support a Rule 12(b)(6) dismissal only where “the statute’s barrier to suit is evident from the face of the complaint”); *accord Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015); *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003).

posters' online speech that could support their claims. *See id.* at 422 (explaining that there were no allegations in support of plaintiffs' securities claim that Lycos had taken a short position or engaged in "any ... stock transactions" to profit from the alleged misinformation posted on Lycos's message board).

The CDA issue presented by this appeal is not whether Backpage is a "publisher" of illegal commercial sex advertisements offering Plaintiffs for sale—it surely is. Rather, the issue is whether *Plaintiffs' claims*, as pled, "treat" Backpage "as the publisher or speaker" of content provided by another, a required element of Section 230(c)(1) that the District Court neglected even to examine. As explained below, Plaintiffs' claims are premised on allegations that, during the period before the publication of the advertisements that held Plaintiffs out for sale for sex, Backpage purposefully engaged in a systematic effort to solicit and encourage child sex trafficking on Backpage.com. Thus, in contrast to *Lycos*, which involved website features "standard" for online message boards, 478 F.3d at 420, Backpage did not merely have notice of occasional illegal content on its site; rather, it organized the website for the purpose of attracting and supporting illegal transactions involving children, among others. App.26-45. As the Ninth Circuit has stated, to preclude claims simply because "a website uses data initially obtained from third parties would eviscerate [the statute]." *Fair Hous. Council of*

San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1171 (9th Cir. 2008).

Before turning in Section II.C., *infra*, to a more complete treatment of the reasons why their sex trafficking and Chapter 93A claims plainly do not “treat[] [Backpage] as the publisher or speaker” of the various advertisements, Plaintiffs first address in more detail the interpretation of the phrase “treat as the publisher or speaker.”

B. A Claim “Treats” a Defendant as a “Publisher or Speaker” Only When the Claim Targets the Act or Process of Communicating Third-Party Content

While Section 230 defines “[i]nteractive computer service” and “[i]nformation content provider,” *see* 47 U.S.C. § 230(f)(2)-(3), it does not define the phrase “treat as a publisher.” This Court must therefore give the words in the provision their plain and ordinary meaning, guided by, *inter alia*, “dictionary definitions, interpretations given to the same terms by judicial construction, and the statutory context in which the words are used.” *Hernández-Miranda v. Empresas Díaz Massó, Inc.*, 651 F.3d 167, 171 (1st Cir. 2011).

The meaning of the word “publisher” is uncontroversial: “one that makes public,” or “the reproducer of a work intended for public consumption.” *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (*quoting* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1837 (1981)). Likewise, the plain meaning of

the word “treat” is straightforward: “to regard and deal with in a specified manner—usually used with as.” MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/treat> (last visited Sept. 28, 2015). There is, however, no dictionary definition for the phrase “treat as a publisher,” and this Court must therefore consider the phrase’s “object and policy,” *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)), as well as “its historical context,” *United States v. Yellin*, 272 F.3d 39, 48 (1st Cir. 2001).

There is likewise no controversy about the background that led Congress to enact Section 230. It did so “in response to a [New York] state-court decision, *Stratton Oakmont v. Prodigy Services Co.* [1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)],” which held that, because the interactive computer service Prodigy sometimes “deleted ... distasteful third-party postings” that appeared on Prodigy-owned bulletin boards, Prodigy was subject to strict, common law “publisher’s liability” for defamatory content that any one of its millions of users might choose to post on any one of Prodigy’s numerous online bulletin boards. *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009). Congress was concerned that, in an effort to avoid triggering such “publisher’s liability,” ISPs would abandon any and all “efforts to sanitize content” that third parties might post on their websites. *Id.* Section 230(c) resolved Congress’s concern by preempting,

with respect to ISPs like Prodigy, the species of common law “publisher’s liability” that the New York court had applied in *Stratton Oakmont*, thus enabling ISPs to undertake good-faith efforts to regulate third-party content on their websites without fear that doing so would trigger potential “publisher’s liability” should some offensive content remain. *See id.*

Given this historical context, courts have accepted that the wording of Section 230(c)(1) has its roots in the common law of defamation, which “treats as publishers” those who participate, either intentionally or negligently, in the communication of a defamatory matter to a person other than the person defamed. *See* RESTATEMENT (SECOND) OF TORTS §§ 577, 581; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (“The term[] ‘publisher’ derive[s its] legal significance from the context of defamation law.”); *Klayman*, 753 F.3d at 1359.

To be sure, federal courts have held that Section 230 is not limited to defamation claims and “does more than just overrule *Stratton Oakmont*.” *Accusearch*, 570 F.3d at 1195. Rather, in those instances where courts have specifically interpreted the phrase “treat[] as the publisher or speaker of information provided by another,” they have concluded that it bars claims that seek to impose liability solely on the basis of a website operator’s “exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content,” *Zeran*, 129 F.3d at 330, which is conduct

that “falls within the heartland meaning of ‘publisher,’” *see Klayman*, 753 F.3d at 1359 n*. To satisfy this test, the claim must either impute the allegedly harmful content itself to the defendant, as did the claims in *Lycos*, or otherwise seek to attach liability to the act or process of publishing the content.

Nothing in Section 230’s plain language or historical context remotely suggests that Section 230(c)(1) was intended to provide a website operator like Backpage with an absolute defense to a claim alleging that it engaged in affirmative, deceptive, and injurious conduct, in violation of federal and state criminal laws, in order to maximize its ability to profit from the unlawful commercial sex trade.⁵ Indeed, on the handful of occasions when a website defendant has engaged in wrongful affirmative conduct distinct from the exercise of traditional editorial functions with respect to third-party content, the Section 230(c)(1) defense has failed. In *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), for example, the Ninth Circuit held that Section 230 did not bar a plaintiff’s

⁵ One other federal district court case, also involving Backpage, has addressed the application of the CDA to a sex trafficking claim brought under the TVPRA’s private right of action provision. *See M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011). In *M.A.*, however, the plaintiff—backed only by a handful of bare-bones allegations in support of her TVPRA claim, *see* First Am. Compl. ¶¶ 11-13, *M.A. v. Village Voice Media Holdings, LLC*, 10-CV-1740 (E.D. Mo. Dec. 7, 2010), ECF No. 23—argued that Backpage (1) should be deemed the creator of the advertisements that trafficked her for sale and (2) was not an ISP. The plaintiff did not argue that her TVPRA claim sought to hold Backpage liable for conduct other than its exercise of traditional editorial functions. *See M.A.*, 809 F. Supp. 2d at 1044, 1048, 1050.

promissory estoppel claim where the plaintiff alleged that a Yahoo! executive had failed to fulfill her oral promise to remove the plaintiff's ex-boyfriend's posting of fraudulent online profiles. The *Barnes* court reasoned that the promissory estoppel claim sought to impose liability on Yahoo!'s breach of an enforceable promise—and thus did not seek to hold Yahoo! liable as a publisher or speaker of third-party content, but as a promisor who had breached. *Id.* at 1107 (describing the promise as a “legally significant event” and the breach as behavior distinct from Yahoo!'s conduct as a publisher); *see also Xcentric Ventures, LLC v. Borodkin*, No. 13-15544, 2015 WL 5010674, at *2 (9th Cir. Aug. 25, 2015) (per curiam).

Even in *Lycos*, where this Court rejected the plaintiff's argument that Lycos was not exercising “traditional editorial functions” when it made industry-standard, content-neutral decisions with respect to the “construct and operation” of its online bulletin boards, the plaintiff's claims clearly sought to “impute” to Lycos a third party's defamatory bulletin board posting. *Lycos*, 478 F.3d at 421-22. Both *Lycos* and *Barnes*, therefore, confirm that Section 230(c)(1) insulates ISPs from liability that depends solely on the ISP's publication of third-party content—it does *not* immunize an ISP's own affirmative, non-publishing acts that otherwise run afoul of the law.

In an effort to sidestep the language and historical context of the statute, Backpage regaled the District Court with string cites of federal decisions

dismissing claims pursuant to Section 230(c)(1). But in the cases that Backpage relied upon, and indeed the vast bulk of decisions under Section 230, the plaintiffs' claims were seeking to impose liability on the website operator for conduct that "falls within the heartland meaning of 'publisher.'" *Klayman*, 753 F.3d at 1359 n*. For this reason, courts had little problem determining that those claims "treated" the defendant as a publisher. Moreover, many such decisions actually address (and reject) plaintiffs' arguments for why the website defendant, though having done nothing more than exercise traditional editorial functions, should, under another prong of the statute, be deemed a co-creator of offensive postings that indisputably originated with an unrelated third party. *See, e.g., Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 409-10, 415 (6th Cir. 2014) (addressing whether ISP developed content at issue in plaintiff's defamation claims); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124-25 (9th Cir. 2003) (addressing whether ISP was an "information content provider" of misinformation underlying plaintiff's defamation and other state tort claims). As explained further below, Plaintiffs' sex trafficking and Chapter 93A claims here are of a wholly different character from the claims in these cases relied upon by Backpage.

C. Plaintiffs’ Claims Do Not “Treat” Backpage as a “Publisher or Speaker” of Particular Advertisements

The District Court’s dismissal of Plaintiffs’ claims under Section 230 fails to comport with the plain meaning of the phrase “treat as a publisher” because the claims do not impute the allegedly harmful content to the defendant or seek to attach liability to the act or process of publishing the content. Rather, Plaintiffs have plausibly alleged that Backpage engaged in an affirmative course of conduct for the express, non-neutral purpose of creating a safe and hospitable online bazaar for child sex trafficking. Plaintiffs’ claims seeking to hold Backpage liable for this conduct simply are not aimed at traditional publishing or editorial functions.

Indeed, Backpage’s proposed interpretation of Section 230—adopted by the District Court—would write the “treat as a publisher” element out of the statute entirely. *See J.S. v. Village Voice Media Holdings, L.L.C.*, No. 90510-0, 2015 WL 5164599, at *3 (Wash. 2015) (en banc); *id.* at *8 (Wiggins, J. concurring). Under Backpage’s interpretation, any website that engages in unlawful activity, but does not create specific content, would automatically be immune from any civil suit. The words of the statute say otherwise. *See Leocal v. Ashcroft*, 543 U. S. 1, 12 (2004) (“[W]e must give effect to every word of a statute wherever possible.”).

1. *Plaintiffs' Sex Trafficking Claims Are Based on Backpage's Independent Criminal Conduct.*

Under *Lycos*, in determining whether Section 230(c)(1) bars a plaintiff's claim, a court is not to undertake a categorical approach, but rather must ascertain whether the *particular factual allegations* on which the claim is based “would treat the [defendant] as the publisher of a particular posting” created wholly by another party. 478 F.3d at 422. As the statutory language and *Barnes* demonstrate, a cause of action cannot be understood to “treat” the defendant “as a publisher” merely because the defendant's business involves some publishing functions.

Indeed, Plaintiffs' claims under the TVPRA and the MATA do not “treat” Backpage “as a publisher” at all, because none of these claims impute another's speech to Backpage. *See Lycos*, 478 F.3d at 422 (claim treated defendant as a publisher because “any liability against [defendant] must be premised on imputing to it the alleged misinformation” written by message board users). Plaintiffs do not assert any claims that sound in defamation, or that resemble defamation despite being asserted as a different cause of action. Nor do Plaintiffs' TVPRA and MATA claims seek to hold Backpage liable for posting the advertisements itself, or for the act of communicating the advertisements. *Compare, e.g., Zeran*, 129 F.3d at 333 (under plaintiff's claims, defendant would be “cast ... in the same position as the party who originally posted the offensive messages”). Rather, Plaintiffs are seeking to hold Backpage liable for its own affirmative conduct—

conduct that ranged far beyond the “standard elements of web sites ‘with [both] lawful and unlawful potential.’” *Lycos*, 478 F.3d at 421 (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005)); see *J.S.*, 2015 WL 5164599, at *3 (explaining that Backpage’s policies, designed to enable sex trafficking, are “not simply neutral policies prohibiting or limiting certain content”).

Separate from whatever publishing functions it might perform, Backpage has a legal obligation to comply with criminal laws, including laws that prohibit it from participating in child sex trafficking ventures. See *Barnes*, 570 F.3d at 1102 (Section 230 only protects ISPs from liability where the “duty that the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a ‘publisher or speaker’”). Under the TVPRA, anyone who knowingly “benefits, financially or by receiving anything of value, from participation in [an underlying child sex trafficking] venture” is criminally liable, 18 U.S.C. § 1591(a)(2), and the statute authorizes victims of sex trafficking to sue any persons who “knowingly benefit financially ... from participation in [the sex trafficking] venture” *Id.* § 1595. This provision makes clear that one can be liable for unlawful “participation” without being the individual perpetrator of the commercial sex trafficking acts.⁶ Like the TVPRA, the MATA also has a private right of action

⁶ The Supreme Court has held that “participate” is a “term[] and concept[] of breadth.” *Russello v. United States*, 464 U.S. 16, 21 (1983); see also *Negusie v. Holder*, 555 U.S. 511, 544 (2009) (Thomas, J., dissenting) (explaining that to

that enables victims to sue “[a]ny business entity that knowingly aid[ed] or [was] a joint venturer” in trafficking victims “for sexual servitude.” Mass. Gen. Laws ch. 265, § 50(d).

Here, Plaintiffs alleged that Backpage has intentionally created an online market dedicated to illegal prostitution, including commercial sex involving minors. App.14-18; *cf. Dart*, 2015 WL 5174008, at *12 (“[A] large percentage of the ads in the adult services portion of the Backpage.com website are ... prostitution ads ... connected to human trafficking.”). Backpage has developed this virtual haven for criminal sex transactions and participated in and aided sex trafficking ventures through a calculated course of conduct, which includes: (1) steering traffickers toward advertising language that will avoid law enforcement scrutiny, App.39-40; (2) accepting non-traditional payment methods, including Bitcoin, in order to make traffickers’ payments untraceable and the online commercial sex market more attractive to traffickers and other predators, App.34-35; (3) stripping metadata, including geolocation, from photographs uploaded to the site with the intent to hinder law enforcement’s identification of child sex traffickers, App.37-38; (4) intentionally removing law enforcement’s “sting” advertisements in order to protect traffickers’ commercial sex market, App.32; (5)

“‘participate’ means simply ‘to take part’ or ‘to have a share, to take part in something,’” a relatively low bar (citations omitted)).

hosting private communications between traffickers and customers to facilitate completion of transactions, App.36-37; and (6) feigning cooperation with victim-protection organizations and law enforcement while deliberately refusing to deploy low-cost techniques, including computer algorithms, that could detect the sexual exploitation of children with reasonable accuracy, App.28-29.

These allegations describe unusual and purposeful conduct that is very different from the typical Section 230 case in which the ISP serves as a neutral intermediary for the dissemination of content. *See, e.g., Lycos*, 278 F.3d at 415; *Johnson v. Arden*, 614 F.3d 785, 787-88 (8th Cir. 2010). Backpage was not merely acting as a publisher when it knowingly operated and protected an online marketplace for illegal transactions similar to those that produced federal criminal convictions in *U.S. v. Omuro*, No. 3:14-cr-336(WHO) (N.D. Cal.), against the owner of MyRedBook.com, a sex trafficking website remarkably similar to Backpage.com, and in *U.S. v. Ulrich*, No. 14-cr-68(KBF) (S.D.N.Y.), against the owner of Silkroad.com, a marketplace for illegal drugs and other contraband, *see U.S. v. Ulrich*, 31 F. Supp. 3d 540, 549-50 (S.D.N.Y. 2014). Accordingly, the allegations supporting Plaintiffs' sex trafficking claims, which neither target nor rely on any specific communication or speech, do not treat Backpage as a publisher.

Indeed, these are exactly the types of allegations that the Washington Supreme Court found that, if proved, would establish that Backpage was not

entitled to a Section 230 defense under, *inter alia*, that state's law against the sexual exploitation of children. In an *en banc* decision, the court concluded that Backpage's alleged conduct of developing its content requirements in such a way as to assist sex traffickers in evading law enforcement scrutiny would take Backpage outside the protection of the CDA. *J.S.*, 2015 WL 5164599, at *3. The court also concluded that there were sufficient allegations that Backpage had contributed to the creation of content to justify further discovery on that issue.⁷ *J.S.*, 2015 WL 5164599, at *1. In his thoughtful concurring opinion, Justice Wiggins recognized that the majority's opinion correctly "implies that the plaintiff's [sex trafficking] claims do not treat Backpage.com as the publisher or speaker of another's information under the [CDA]." *Id.* at *4 (Wiggins, J., concurring). He then expounded on the publisher prong of Section 230, concluding that claims alleging that Backpage had facilitated sex trafficking of children did not treat the defendant as a publisher, and thus Section 230 did not apply. *See id.* at *4. Justice Wiggins reasoned that assertions of broad immunity, which find no support in the text of Section 230, should not be used to "defeat

⁷ Washington state courts do not apply the standard for Rule 12(b)(6) motions enunciated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See J.S.*, 2015 WL 5164599, at *2. Nonetheless, the court's rulings of law are instructive here; moreover, Plaintiffs in this case have alleged much more detailed factual allegations than the plaintiffs in *J.S.* did, and as Plaintiffs argued in the District Court, their factual allegations are more than sufficient to satisfy *Twombly*.

potentially meritorious claims alleging flagrantly criminal complicity or inducement by website hosts on the Internet.” *Id.* at *10. Here too, Plaintiffs’ claims describing Backpage’s meaningful participation in sex trafficking through its online commercial marketplace plainly do not treat Backpage as a publisher or speaker.

2. *The District Court’s Dismissal of Plaintiffs’ Chapter 93A Claim Pursuant to the CDA Was Based on a Fundamental Misunderstanding of the Claim.*

The District Court fundamentally mischaracterized Plaintiffs’ Chapter 93A claim, asserting that the claim was based on the “‘deceptive’ design of Backpage” and on an “entire website” theory. Add.25. In fact, the gravamen of Plaintiffs’ claim of unfair and deceptive trade practices is not website design, but the misrepresentations that Backpage made to law enforcement and social service organizations in order to deflect law enforcement and public attention from the sex trafficking of children on its website. App.25-29, 57-58. While characterizing itself as the “sheriff” of the Internet, Backpage falsely assured NCMEC and law enforcement that it would, *inter alia*, be vigilant in attempting to detect trafficking of minors, increase its reporting of suspicious advertisements, evaluate and adopt both routine and advanced techniques to detect advertising of children, and be a model of cooperation with law enforcement. *Id.* As a result of these misrepresentations, Backpage induced NCMEC and others to make public

statements supportive of Backpage, at a critical juncture—as Backpage aggressively sought to secure its status as the dominant website in the online commercial sex market, knowing that its success involved and benefited from the sale of sex with children. App. 23, 26, 29.

In addressing similar unfair and deceptive business practice claims against online providers, other courts have held that the CDA does not automatically shield inquiry into the merits of claims that target misrepresentations to third parties. *See Small Justice LLC v. Xcentric Ventures LLC*, No. 13-cv-11701, 2014 WL 1214828, at *9 (D. Mass. Mar. 24, 2014); *Moving & Storage, Inc. v. Panayotov*, No. 12-cv-12262, 2014 WL 949830, at *2-3 (D. Mass. Mar. 12, 2014). In *Moving & Storage*, the court concluded that “the plaintiffs do not seek to treat the defendants as the publisher or speaker of the third-party reviews [posted on their website],” because plaintiffs’ “cause[] of action [was] based not on [the defendants’] publishing conduct but on [their] representations regarding such conduct, [which] would not be immunized.” *Id.* at *2 (quoting *Levitt v. Yelp! Inc.*, Nos. C-10-1321, C-10-2351, 2011 WL 5079526, at *9 (N.D. Cal. Oct. 26, 2011)). In *Small Justice*, the court denied the defendant’s motion to dismiss the Chapter 93A claim predicated on defendant’s refusal to take down defamatory reports while simultaneously advertising services by which the plaintiff could pay defendant to restore his reputation. 2014 WL 1214828, at *9. Similarly, the Ninth Circuit recently

suggested that the CDA would not bar claims alleging that an ISP had represented its publishing conduct as neutral, although it was not. *Xcentric Ventures*, 2015 WL 5010674, at *2.

Here, Plaintiffs’ allegations of unfair and deceptive practices center on Backpage’s deceptive representations, conduct that is wholly separate from Backpage’s publication of commercial sex advertisements. The District Court misconstrued Plaintiffs’ Chapter 93A claim and, consequently, failed to recognize that the allegations of that claim simply do not treat Backpage as the “publisher or speaker of any information provided by another.” 47 U.S.C. § 230(c)(1).

D. Holding Backpage Subject to Plaintiffs’ Suit Avoids an Unwarranted Federal Intrusion into State Law Matters

There is yet another critical element of the statutory interpretation exercise which compels the Court to reject the expansive reading of Section 230 proposed by Backpage and adopted by the District Court. Section 230 represents an instance of express federal preemption of state law under the Supremacy Clause. While Congress intended that Section 230 would sometimes override state law, Congress did not intend to completely “occupy the field” of regulation of internet communications. *See Weaver’s Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 472-73 (1st Cir. 2009) (summarizing distinction between express, field, and conflict preemption). Rather, the preemptive effect of the CDA is expressly limited in Section 230(e)(3) to “[s]tate or local law that is inconsistent

with this section.” In *Massachusetts Association of Health Maintenance Organizations v. Ruthardt*, 194 F.3d 176, 178-79 (1st Cir. 1999), this Court held that the determination whether a state law is “not inconsistent” with federal law requires the application of established preemption principles, most notably the “presumption against preemption” limiting the displacement of state law to those instances in which Congress has unambiguously dictated that outcome. In the case of Section 230, moreover, *Lycos* held that the extent of any inconsistency with state law depends on the limits of the substantive provisions of Sections 230(c)(1) and (c)(2). 478 F.3d at 418.

Where a disputed statutory term requires judicial interpretation to establish its meaning—which plainly is the case for the phrase “treat[] as the publisher or speaker” in Section 230(c)(1)—the Supreme Court has emphasized that the presumption against preemption generally supports a “narrow reading” of the outer limits of an express statutory preemption provision. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518-20 (1992); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). While most circuits, including this Court in *Lycos*, have concluded that Section 230 should be “broadly” interpreted to protect neutral intermediaries who may host harmful speech, 478 F.3d at 419, it is another matter altogether to liberally extend the outer boundaries of the statute, as the District Court did, *see*

Add.25 n.10, where Congress expressly limited its reach only to *inconsistent* state laws.

Thus, established principles of federal preemption constrain the interpretation of Section 230 as applied to the MATA and Chapter 93A. In the interests of common sense and consistent interpretation of the statute, the same constraint should apply to the analysis of Section 230 as it relates to the federal claim under the TVPRA. *See O’Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996) (discussing importance of “practical, commonsense reading” of statutes).

E. The District Court Should Have Permitted Discovery to Proceed on Other Aspects of Plaintiffs’ Claims

1. *The Allegations That Backpage Contributes to the Creation of Illegal Content Justify Discovery on the Issue.*

Both Backpage and *amici* in the District Court presented arguments on the content creation element of Section 230(c)(1). *See, e.g.*, App.103-113. Though Plaintiffs alleged in their Complaint that Backpage does contribute to the development of the content in its “Escorts” section through active “coaching” of advertisers and other conduct, Plaintiffs did not rely on this element of the statute as a matter of law in opposing the motion to dismiss. Instead, Plaintiffs argued that the content provider issue would require further factual development, and the Court should consider the issue only after completion of discovery. App.236. Choosing to address the merits of the issue anyway, the District Court concluded

that Backpage’s conduct, as alleged, could not qualify it as a “content provider” under the statute. Add.14-15.

But a more careful analysis by the Washington Supreme Court of the allegations in *J.S.* reached the opposite conclusion. The court there held that the allegations that Backpage intentionally induced illegal content that appeared on the website would, if proved, demonstrate that Backpage was a content provider, and thus were sufficient to justify proceeding with discovery before resolving the issue. *See* 2015 WL 5164599, at *2-3. The court explained that, “[v]iewing J.S.’s allegations in the light most favorable to J.S., as we must at this stage, J.S. alleged facts that, if proved true, would show that Backpage did more than simply maintain neutral policies prohibiting or limiting certain content.” *Id.* at *3. In order to determine whether Backpage acted as a content creator, it would be necessary to “ascertain whether in fact Backpage designed its posting rules to induce sex trafficking,” and the court ordered the case to proceed to discovery on that question. *Id.*

In this case, Plaintiffs allege far more specific facts than appeared in *J.S.*, including that specific aspects of the website coached traffickers on various means to avoid detection by law enforcement. Given, as noted *supra* n.4, that Section 230(c)(1) merely provides an affirmative defense, not immunity from suit itself, the District Court should have addressed the content creation issue on a more

complete record. The First Circuit has cautioned that a Rule 12(b)(6) dismissal on the basis of an affirmative defense is only appropriate where the facts gleaned from the complaint “conclusively establish the affirmative defense.” *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 16 (1st Cir. 2003). Consistent with these authorities, this Court should apply this principle here and permit Plaintiffs to proceed to discovery on the content creation issue.

2. *Backpage’s Reliance on Its Own Self-Monitoring Justifies Discovery Under Section 230(c)(2).*

Consistent with Congress’s intent to avoid more cases like *Stratton Oakmont*, *see supra* section II.B, Section 230(c)(2) provides that no ISP “shall be held liable on account of any action voluntarily taken *in good faith* to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” 47 U.S.C. § 230(c)(2) (emphasis added). Backpage asserted below, and the District Court apparently agreed, that Section 230(c)(2) did not apply because that provision can only be invoked by Backpage, and Backpage did not do so. Yet in its arguments on Section 230(c)(1), Backpage touted its purportedly extensive monitoring and filtering of proposed advertisements, the removal of suspect advertisements, and its reporting to law enforcement, all of which Plaintiffs contend to be a sham. Defs.’ Mem. Supp. Mot. Dismiss 3-4, 6; App.205-206.

These are, of course, exactly the types of actions that Section 230(c)(2) is meant to address.⁸

The District Court erred in considering those assertions by Backpage under Section 230(c)(1), thus permitting Backpage to avoid an inquiry into its good faith. Such an approach renders Section 230(c)(2) superfluous. *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (“We resist a reading of [a federal statute] that would render superfluous an entire provision passed in proximity as part of the same Act.”). As Justice Wiggins of the Washington Supreme Court ably explained:

The [CDA’s] actual defenses against civil liability are found in subsection 230(c)(2). In other words, subsection 230(c)(1) is neither an immunity nor a defense; it is a prohibition against considering the provider as a publisher or speaker of content provided by another. ... Backpage.com’s reading ... totally ignores subsection 230(c)(2); [it] instead asserts that good faith is irrelevant to subsection 230(c)(1). Whether or not that is correct, good faith is certainly relevant to subsection 230(c)(2), which expressly requires “good faith.” We cannot just ignore this subsection—we read statutes in context and consider the statute’s placement within the entire statutory scheme. ... [I]t would be absurd to ignore this language in order to protect the

⁸ Furthermore, the nature and extent of Backpage’s monitoring and filtering practices are questions of fact, and on this topic, the District Court impermissibly found facts and drew inferences in Backpage’s favor at the motion to dismiss stage. *Compare, e.g.*, Add.15 (finding that stripping metadata from photographs “is a standard practice among Internet service providers”), *with* App. 37 (allegation that Backpage “deliberately adjusted [its] server software, at additional expense, to delete the metadata on each uploaded photo so that law enforcement cannot track the photo”). In denying Plaintiffs’ motion to strike Backpage’s improper attempt to dispute the factual allegations, App.182-85, the District Court stated, incorrectly as it turned out, that the court would “only consider facts properly pled in the complaint,” App.188.

actions of Backpage.com, taken in bad faith, that have nothing to do with publishing or speaking another's content.

J.S., 2015 WL 5164599, at *6 (Wiggins, J., concurring) (citation omitted).

Here, the District Court should have treated Backpage's arguments as an implicit invocation of Section 230(c)(2), recognized that Plaintiffs have made extensive allegations of bad faith by Backpage, and permitted discovery to proceed on that issue.

III. THE TVPRA'S CIVIL PROVISIONS ARE PART OF THE "ENFORCEMENT" SCHEME OF A FEDERAL CRIMINAL STATUTE.

Even if Plaintiffs' TVPRA claim fell under Section 230(c)—which it does not—it should nonetheless survive dismissal under Section 230(e)(1), which provides that the CDA shall not “be construed to impair the enforcement of ... any ... Federal criminal statute.” 47 U.S.C. § 230(e)(1). Here, Plaintiffs bring suit under a federal criminal statute, which provides a civil remedy as part of its enforcement scheme.⁹

The “enforcement” of the criminal laws is not restricted to criminal prosecutions by the state. Indeed, the definition of “enforcement” is any “act or process of compelling compliance with a law, mandate, command, decree or

⁹ In *Lycos*, this Court “express[ed] no view on the appropriateness of applying Section 230 immunity to a putative civil claim under 47 U.S.C. § 223,” one of the provisions specifically exempted from the CDA's scope by Section 230(e)(1). 478 F.3d at 421 n.4.

agreement.” BLACK’S LAW DICTIONARY 608 (9th ed. 2009). “Enforcement” can often refer to suits pursuant to civil provisions that support and reinforce criminal provisions of the same or related statutes.

For instance, civil RICO is part of the “enforcement” scheme of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* See, e.g., *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1290 (11th Cir. 2006) (per curiam) (“It is consistent with civil RICO’s purposes—to *expand enforcement beyond federal prosecutors with limited public resources—to turn victims ... into prosecutors as private attorneys general*” (emphasis added)); *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1089 (9th Cir. 1986) (“Civil RICO deliberately created dual avenues of enforcement—private and public.”).¹⁰ Accordingly, in *Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 WL 3201931 (C.D. Ill. Aug. 3, 2012), where a plaintiff sued a number of website operators for civil RICO violations, the district court recognized that the CDA “arguably ... may not be used to bar” a civil claim that a plaintiff brings under a criminal statute’s private right of action provision, “because that would impair the enforcement of a Federal criminal statute.” *Id.* at *9.

¹⁰ See also Gerald E. Lynch, *How Useful Is Civil RICO in the Enforcement of Criminal Law?* 35 VILL. L. REV. 929, 929 (1990) (“Civil lawsuits of a particular kind have been authorized, in part for the purpose of supplementing [criminal] procedures.”).

Likewise, civil antitrust actions are part of the “enforcement” scheme of the Sherman Act, 15 U.S.C. § 1 *et seq.* See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (“These private [antitrust] suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.”); *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 66 (1st Cir. 1969) (Clayton Act “enable[s] the private antitrust litigant to contribute significantly to the antitrust enforcement efforts of the Justice Department”). The same principle has been applied to civil remedies for victims of child pornography. See *Doe v. Peterson*, No. 2:09–cv–13138, 2011 WL 1120172, at *5 (E.D. Mich. Mar. 24, 2011) (“[T]he Child Pornography Protection Act of 1995 ... is clearly an extensively detailed legislative scheme designed to police child pornography. One of the ways in which it discourages child pornographers is by permitting civil actions against them.”).¹¹

In short, these types of provisions enforce law-abiding behavior by subjecting those who break the law to civil penalties established by criminal statutes. If Congress had wanted to specify that Section 230(e)(1) only applied to criminal “prosecutions,” it could have done so.

¹¹ Indeed, Section 230(e)(1) expressly exempts from the CDA’s coverage the enforcement of “chapter ... 110 (relating to sexual exploitation of children) of title 18,” which includes 18 U.S.C. § 2255, a private civil action for exploited children. The similar civil remedy under 18 U.S.C. § 1595 was enacted after the CDA’s passage.

There are good reasons why Congress would choose to include an enforcement mechanism in a criminal statute that is not subject to the restrictions of a criminal prosecution. For instance, Congress might want offenders to be directly accountable to their victims, particularly when the conduct at issue has very serious consequences for those victims. It might want offenders to face liability on a lower standard of proof than “beyond a reasonable doubt.” It might recognize that the resource constraints of prosecutors will inevitably leave some criminal wrongs unredressed. But regardless of specific motivation, Congress chose to include a civil enforcement provision in the TVPRA, and courts must accordingly give that provision its full effect: “When Congress enacts a statute that provides for both private and administrative enforcement actions, Congress envisions a role for both types of enforcement. Otherwise, Congress would not have provided for both.” *Kristian v. Comcast Corp.*, 446 F.3d 25, 59 (1st Cir. 2006).

The cases on which the District Court relied plainly misread Section 230(e)(1) and its contextual implications. In *Doe v. Bates*, No. 5:05-CV-91, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006), the court concluded without any textual justification that “enforcement” means only “governmental enforcement” and grounded its decision on its view that categorical “immunity from all private civil liability comports with the clear Congressional policies.” *Id.* at *3, *21. The *Bates*

court's upside-down approach to statutory interpretation, ignoring Section 230(e)(1)'s language in favor of the court's apparent notion of "Congressional policies," is improper. Moreover, even taken on its own terms, the *Bates* court's reasoning cannot be squared with the rest of the statute, which shows that Congress did not intend the CDA to provide websites with "immunity from all private civil liability." The decision in *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), simply followed the *Bates* court's errors. And in *Obado v. Magedson*, No. 13-2382, 2014 WL 3778261 (D.N.J. July 31, 2014), none of plaintiff's claims were based on an alleged violation of federal criminal law, let alone brought under a federal criminal statute's private right of action provision. *See id.* at *8.

It is clear that Section 1595 represents a part of the TVPRA's enforcement scheme. The civil remedy is located in title 18 of the U.S. Code. It supports and reinforces the goals of the statute by holding offenders directly liable to their victims and imposing on them additional monetary penalties above what they would pay as a criminal fine. It provides a mechanism for holding an offender liable even when the government does not have the resources to devote to a particular case. Given the disturbing prevalence of child sex trafficking, the latter is particularly salient in considering how the TVPRA was designed to function. Read in the proper context, then, Section 230(e)(1) cannot be read to bar Plaintiffs'

claims under the TVPRA. Adopting Backpage’s reading, as the District Court did, would hinder enforcement of a federal criminal statute—the exact result that the statute, by its plain language, attempted to prevent.

IV. THE DISTRICT COURT ERRED IN FINDING NO CAUSAL CONNECTION BETWEEN BACKPAGE’S UNFAIR AND DECEPTIVE BUSINESS PRACTICES AND PLAINTIFFS’ INJURIES

The District Court concluded in peremptory fashion that Plaintiffs’ Chapter 93A claim did not adequately plead causation because the claim was “too speculative to fall as a matter of law within the penumbra of reasonably [sic] foreseeability.” Add.25. Chapter 93A requires “a causal connection between the deception and the loss,” *i.e.*, actual causation, and “that the loss was foreseeable as a result of the deception,” *i.e.*, proximate causation. *Smith v. Jenkins*, 732 F.3d 51, 71 (1st Cir. 2013) (internal quotation marks omitted) (quoting *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 952 N.E.2d 908, 912 (2011)). An actual examination of the raft of allegations here, which the District Court did not undertake, shows that Plaintiffs plausibly pled both aspects of causation.

The factual cause inquiry considers whether defendant was a “but-for” cause of a plaintiff’s injury. *See Markarian v. Conn. Mut. Life Ins. Co.*, 202 F.R.D. 60, 68 (D. Mass. 2001). In this case, Backpage portrayed itself to key stakeholders as being committed to countering child sex trafficking on its site, which successfully deflected public scrutiny of its business, and thereby allowed Backpage to grow the

online sex market, and its dominant position in that market, with minimal interference. App.26-29, 57-58. This expanded market ensnared the Plaintiffs, who were repeatedly sold through Backpage.com's commercial sex brokering service. App.58. In other words, the market manipulation by Backpage increased the risk of harm to Plaintiffs, who then were injured in fact.

At the Rule 12(b)(6) stage, courts will rely on “[c]ommon economic sense” to test the plausibility of causation pleadings in cases where market forces are the media of injury. *Boston Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2015 WL 314131, at *4 (D. Mass. Jan. 26, 2015) (rejecting argument that plaintiffs “must negate all potential causes of loss other than those related to [defendants’] activities” in order to allege causation); *see also FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 456 (1986) (finding that FTC may reasonably rely on “common sense and economic theory”). In Chapter 93A cases, courts have found “market effects” that have “an adverse economic impact on the plaintiffs” to constitute factual causation, “*however small and uncertain [those effects] may be.*” *Katin v. Nat’l Real Estate Info. Servs., Inc.*, No. 07-10882-DPW, 2009 WL 929554, at *7 (D. Mass. Mar. 31, 2009) (emphasis added). And while the District Court summarily dismissed Plaintiffs’ theory as too speculative, *Boston Cab* acknowledges that, while all claims “predicated on the independent decisions of third parties; *i.e.*, customers” are “to some extent speculative,” this fact does not

preclude Chapter 93A liability. *Boston Cab*, 2015 WL 314131, at *4 (quoting *Am. Soc. of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 157 (D.C. Cir. 1977)). Therefore, Plaintiffs' allegations that Backpage caused their injuries through actions that had the effect of lowering the supply-side transaction costs involved in sex trafficking online, which in turn increased the demand for and supply of exploited children on the online market, is more than sufficient to plead factual causation.

As to proximate cause, the question is whether the harm that Plaintiffs experienced as a result of Backpage's misrepresentations was reasonably foreseeable to the defendant.¹² See *Smith*, 732 F.3d at 71. When the risk of an injurious criminal act "was not only foreseeable but was actually foreseen," proximate cause is established. *Jupin v. Kask*, 447 Mass. 141, 849 N.E.2d 829, 837 (2006) (quoting *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331, 337 (1983)). In *Mullins*, the court affirmed the trial court's decision to hold a college liable for negligently failing to protect a student who was raped by an intruder, on the basis that risks of criminal attacks on female college students were

¹² Further, "proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." See W. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS 321 (5th ed.1984) (quotations and citations omitted); see also *Copithorne v. Framingham Union Hosp.*, 401 Mass. 860, 520 N.E.2d 139 (1988) (reversing summary judgment for defendant because jury should decide whether rape of patient was foreseeable from reports of the doctor's previous sexual assaults).

foreseeable.¹³ 449 N.E.2d at 337. Here, Backpage not only ignored the risk to children on its website, it took deliberate steps to ensure that prostitution would flourish on Backpage.com and deflected public attention from the sale of children for sex. App.26-28. Backpage even acknowledged that children are being trafficked for sex on its website and has characterized such trafficking as a “scourge.” App.25. Thus, it is beyond question that the injury to Plaintiffs resulting from being sold and raped was foreseeable, because it was actually anticipated by Backpage itself.

V. PLAINTIFFS HAVE PLAUSIBLY ALLEGED THEIR INTELLECTUAL PROPERTY CLAIMS

A. Plaintiffs Have Plausibly Alleged Their Right of Publicity Claims¹⁴

Massachusetts General Laws Chapter 214, § 3A and Rhode Island General Laws § 9-1-28 broadly protect a person’s interest in “not having the commercial value of one’s name, portrait or picture appropriated to the benefit of another.” *Tropeano v. Atlantic Monthly Co.*, 379 Mass. 745, 400 N.E.2d 847, 850 (1980); *see also Leddy v. Narragansett Television LP*, 843 A.2d 481, 490 (R.I. 2004) (“To establish a statutory claim [under § 9-1-28] ... the plaintiff must demonstrate that

¹³ The District Court rejected Plaintiffs’ notice argument, but used case law considering Section 230, rather than causation. Add. 26-28.

¹⁴ As intellectual property claims, the right of publicity claims are exempt from Section 230 immunity. *See* 47 U.S.C. § 230(e)(2); 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:1 (2014) (“The right of publicity is ... properly categorized as a form of intellectual property.”).

the defendant commercially exploited him without his permission.”). The statutes expressly prohibit the unauthorized use of another’s picture for “advertising purposes or for the purposes of trade,” Mass. Gen. Laws ch. 214, § 3A, or “for commercial purposes,” R.I. Gen. Laws § 9-1-28. Both statutes provide a private action to “[a]ny person whose name, portrait or picture is used within” the relevant jurisdiction “to prevent and restrain the use thereof” and to “recover damages for any injuries sustained by reason of such use.” Mass. Gen. Laws ch. 214, § 3A; R.I. Gen. Laws § 9-1-28.

The District Court erroneously drew inferences in Backpage’s favor in concluding that Plaintiffs had failed to state a claim. In particular, the District Court ignored Plaintiffs’ well-pled facts and instead made its own findings that “Plaintiffs do not allege that defendants used their images to extract any direct benefit... Rather, the allegation is that defendants benefitted incidentally” Add.30. In fact, Plaintiffs pled the opposite.

The Complaint clearly states that Backpage used Plaintiffs’ photographs “to enhance the effectiveness of advertisements” and that the photographs are “an *integral* part of [Backpage’s] business model.” App.59 (emphasis added). Indeed, this business model relies on tens of millions of dollars in revenue from ads placed in the “Escorts” section—the only category for which Backpage charges a fee. App.29-30. Rather than an incidental use, Plaintiffs alleged that Backpage

“make[s] an affirmative decision” to display each photograph only after reviewing each one. App.59. It was error for the District Court to assume facts in the light least favorable to the non-moving party.

The District Court also misconstrued the seminal Massachusetts case, *Tropeano*, in evaluating the claims. *Tropeano* stands for the proposition that “the crucial distinction under G.L. c. 214, s 3A, must be between situations in which the defendant makes an incidental use of the plaintiff’s ... picture and those in which the defendant uses the plaintiff’s ... picture deliberately to exploit its value for advertising or trade purposes.” 400 N.E.2d at 850. The District Court fundamentally misunderstood the meaning of “incidental use” as defined in *Tropeano*. In *Tropeano*, the image of the plaintiff was “merely one of several people shown in an otherwise unrelated photograph used to illustrate” a magazine article commenting on modern social mores. *Id.* at 848. Such publication was “incidental” because it was a small, nonessential part of an article containing a broader “sociological commentary, and not ... a means of soliciting sales or in association with an advertisement of any kind.” *Id.* at 851.

In sharp contrast to the use in *Tropeano*, Backpage deliberately used these photographs as the centerpieces of commercial advertisements. App.59-60. Neither *Tropeano* nor the relevant statutes require, as the District Court implied, Add.30, that the advertisements in which Plaintiffs appear must be directly

advertising *Backpage.com* itself, rather than being posted *on* Backpage.com for Backpage's financial benefit. Thus, *Tropeano* presents no bar to Plaintiffs' right of publicity claims.

B. Jane Doe No. 3 Has Plausibly Alleged Her Copyright Infringement Claim

Only two elements must be pleaded to assert a claim of copyright infringement: (1) ownership of a valid copyright and (2) copying of the protected work. *See, e.g., Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 39 (1st Cir. 2012). In deciding a Rule 12(b)(6) motion, a court tests the sufficiency of the pleaded claim. *See, e.g., Tracy v. Winfrey*, 282 Fed. App'x 846, 847 (1st Cir. 2008). In dismissing Jane Doe No. 3's claim, however, despite the fact that both she and Backpage extensively briefed these issues, the District Court did not offer any substantive analysis of the sufficiency of any of the theories of copyright infringement—direct infringement, contributory infringement, or vicarious liability.¹⁵ *See* Add.60-62; Defs.' Mem. Supp. Mot. Dismiss 28-30; Pls.' Mem. Opp'n Mot. Dismiss 27-30. Notably, the District Court did not identify any particular deficiencies in these elements of her claim. *See* Add.31-33 (addressing only damages). It was error to dismiss for failure to state a claim without

¹⁵ The District Court did not question, and Backpage did not challenge, that the copyright claims are exempt from Section 230. Add.31-33.

addressing the merits of that claim or the request for injunctive relief, and instead, to focus exclusively—and prematurely—on monetary damages.

1. *The District Court Should Have Addressed Plaintiff's Prayer for Injunctive Relief.*

The District Court incorrectly assumed that the “only recovery ... open to Jane Doe No. 3” for her copyright infringement claim was “compensatory damages,” and therefore concluded that “[b]ecause she does not plead any redressable damages, [her] ... claim must ... be dismissed.” Add.33. However, the Copyright Act allows for injunctive relief as well, providing that “[a]ny court having jurisdiction of a civil action arising under this title *may ... grant temporary and final injunctions* on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502 (emphasis added). Indeed, the Complaint sought “[s]uch injunctive relief as the Court deems appropriate.” App.62. Nevertheless, the District Court ignored that request and never addressed whether Jane Doe No. 3 was entitled to injunctive relief. Because the Copyright Act permits injunctive relief, because Plaintiff requested that relief, and because the District Court never considered that relief, it was error to dismiss Count V.

Jane Doe No. 3’s allegations state a claim for copyright infringement that warrants injunctive relief. App.60-62. Absent an injunction, she cannot prevent Backpage from displaying or continuing to display her registered, copyrighted photograph, which (in the absence of discovery) she presumes they continue to

maintain in their possession. Notwithstanding this concern, a plaintiff “has no burden to prove likely repetition of the infringement to obtain an injunction.” NIMMER ON COPYRIGHT § 14.06 (quoting *Basic Fun, Inc. v. X-Concepts, LLC*, 157 F. Supp. 2d 449, 457 (E.D. Pa. 2001)).

2. *The District Court Erroneously Assumed the Amount of Actual Damages Without a Developed Factual Record.*

The District Court erroneously and prematurely dismissed the allegations that the display of photographs is “an integral part” of Backpage’s business model, and that Backpage therefore profited from its infringing use of Jane Doe No. 3’s copyrighted work. App.60-61. Plaintiff alleged that the “photographic images ... enhance the effectiveness of advertisements placed on the website” and that Backpage reaps “a financial benefit directly attributable to the public display of such photographs” (including Jane Doe No. 3’s copyrighted photograph) by collecting fees for advertisements that include these photographs. App.60-62.

As the non-movant, Jane Doe No. 3 was entitled to have her well-pleaded facts accepted as true. *Ocasio*, 640 F.3d at 10-11. Instead of allowing the parties to develop the factual record, the District Court erroneously made its own findings, including that (1) there is “no plausible link” between the infringement and any part of Backpage’s profits, and (2) there are no damages attributable to the use of the photograph at issue. *See* Add.32. It based this conclusion on the understanding that escort ads with photographs cost the same as those without photographs (and

hence that Backpage could not have profited from the infringement), and the fact that Jane Doe No. 3 did not allege loss of revenue or licensing fees as a result of the infringement (and hence could not have suffered any monetary injury from the infringement). *Id.* However, common sense dictates that Backpage profits from its decision to allow sex traffickers to advertise their victims with indecent color photographs, and the District Court moreover committed legal error when it chose to ignore Plaintiffs' well-pled allegations on this score and instead draw inferences in Backpage's favor. Furthermore, where, as here, a plaintiff has made a plausible claim of actual damages, a district court cannot conclude on the basis of the pleadings that the plaintiff in fact suffered no damages. *See N.Y. Life Ins. Co. v. Grant*, 57 F. Supp. 3d 1401, 1411 (M.D. Ga. 2014); *see also Steele v. Bongiovi*, 784 F. Supp. 2d 94, 97 (D. Mass. 2011) (on a 12(b)(6) motion, "the Court may look only to the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the complaint and matters of which judicial notice can be taken"); NIMMER ON COPYRIGHT § 12.09 ("Courts should refuse to dismiss a complaint based on apparent legal deficiencies, if discovery could validate its allegations."). Accordingly, the District Court should be reversed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the judgment of the District Court.

Respectfully submitted,

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Dated: September 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September 2015, I electronically filed the foregoing Brief of Plaintiffs-Appellants and the Addendum to the Brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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15-1724

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

JANE DOE NO. 1, JANE DOE NO. 2, and JANE DOE NO. 3, a minor child, by
her parents and next friends SAM LOE AND SARA LOE,

Plaintiffs-Appellants

v.

BACKPAGE.COM, LLC, CAMARILLO HOLDINGS, LLC (f/k/a VILLAGE
VOICE MEDIA HOLDINGS, LLC), and NEW TIMES MEDIA, LLC,

Defendants-Appellees

**On Appeal from the United States District Court
for the District of Massachusetts (14-cv-13870-RGS)**

**ADDENDUM TO BRIEF OF THE APPELLANTS
REQUIRED BY FIRST CIRCUIT LOCAL RULE 28.0**

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R.I. Gen. Laws § 9-1-2854

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 14-13870-RGS

JANE DOE NO. 1, a minor child,
by her parent and next friend MARY ROE;
JANE DOE NO. 2;
and JANE DOE NO. 3, a minor child,
by her parents and next friends SAM LOE AND SARA LOE

v.

BACKPAGE.COM, LLC, CAMARILLO HOLDINGS, LLC
(f/k/a VILLAGE VOICE MEDIA HOLDINGS, LLC),
and NEW TIMES MEDIA, LLC

MEMORANDUM AND ORDER
ON DEFENDANTS' MOTION TO DISMISS

May 15, 2015

STEARNS, D.J.

In this litigation, two important public policies collide head on – the suppression of child sex trafficking and the promotion of a free and open Internet. Plaintiffs Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3 (the Doe plaintiffs) seek redress in the form of money damages from defendants Backpage.com, LLC; Camarillo Holdings, LLC (f/k/a Village Voice Media Holdings, LLC); and New Times Media, LLC. The Doe plaintiffs allege that they were molested and repeatedly raped after being advertised as sexual wares on defendants' website, backpage.com (Backpage). Defendants

contend that most of the Doe plaintiffs' claims are preempted by the Communications Decency Act (CDA), 47 U.S.C. § 230, and that the remaining intellectual property claims (unauthorized use of a person's image and copyright infringement) fail to state claims upon which relief may be granted.

BACKGROUND¹

Backpage is an online classifieds forum that groups goods and services advertised for sale by geographic location and subject matter. At issue in this case is the forum's adult entertainment section and its subcategory offering the services of "escorts." The Doe plaintiffs allege that in the scungy world of adult entertainment, this section of Backpage is a notorious haven for promoters of the illicit sex trade, and even more troubling, the trafficking of children for sex. The Doe plaintiffs contend that Backpage's business model depends in large part on the revenues it earns from its involvement in the trafficking of children. To this end, Backpage is alleged to have structured its adult entertainment section to lightly camouflage its illegal content to divert the attention of law enforcement. In support, the Second Amended Complaint (SAC) marshals the following facts:

¹ On a motion to dismiss, the court accepts as true the well-pleaded facts of a complaint.

- Backpage charges a fee for posting advertisements in the adult entertainment section (and not in most other licit areas of the website). The fee for the “adult” ads ranges from \$12.00 to \$17.00 per posting. Backpage charges an additional fee for each reposting of an adult ad, and for featuring the ad (with a selection of text and photos) prominently on the right side of the website.
- Backpage does not require posters in the adult entertainment section to verify their identity. The website also does not require that the poster use a registered credit card linked with a name and address, and accepts anonymous payments in the form of prepaid credit cards, or pseudo-currencies, such as Bitcoin.
- Backpage does not require a poster to verify the age of an “escort” whose services are offered on the website. Although the website will not accept an ad when the poster enters an age of less than 18, it will permit the poster to immediately re-enter an assumed age.
- Backpage does not require any verification of the telephone numbers posted in its adult entertainment section. It also permits users to enter telephone numbers using any combination of character strokes rather than in the more traceable (by law enforcement) nominal numbers required in other sections of the website (such as “twoO13fourFive678niNe” rather than “201-345-6789”). Backpage does not require posters in the adult entertainment section to use their actual email addresses, but provides an email forwarding service that protects a poster’s anonymity.
- Backpage strips out metadata associated with photographs (such as date, time, geolocation and other identifying information) before publishing the photographs on its website. This prevents law enforcement from effectively searching for repostings of the same photograph.
- While Backpage bars the use of certain words and phrases through its “automatic filtering” system, such as “barely legal,” “high school,” “innocent,” “sex,” “blow job,” “hand job,” “schoolgirl,” “teen”, and “teenage,” it readily permits the use of suggestive

circumlocutions like “girl,” “young,” “underage,” and “fresh.” It also does not filter out easily recognizable abbreviations of forbidden words, such as “brly legal” or “high schl.”

The Doe plaintiffs further allege that defendants have waged a phony war against sex traffickers to divert attention from their illegal activities. While Backpage claims that its adult entertainment advertisements are screened by trained moderators, it has refused to install readily available technology that would far more accurately detect the trafficking of children. According to the Second Amended Complaint, Backpage's highly touted claim to make regular referrals to the National Center of Missing & Exploited Children has led to few instances of identification or rescue. Although Backpage will on request remove an offending ad in the geographic location in which it is posted, it does nothing to report or remove the identical ad posted in other geographical areas, or other ads involving the same child. The overall effect, the Doe plaintiffs contend, is to create a Potemkin-like "façade of concern" that obscures the shady source of its filthy lucre. SAC ¶ 34.

Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3 aver that they have been each personally harmed by defendants' unsavory business practices. Jane Doe No. 1 was first trafficked by pimps on Backpage after running away from home in February of 2012, when she was 15 years old. She was again

sold on Backpage in March of 2013, after she ran away a second time. Between June of 2013 and September 10, 2013, her "services" were advertised on Backpage each and every day. As a result of the ads, she engaged in 10 to 12 sex transactions daily with adult men in Massachusetts and Rhode Island. Her pimp moved her from town to town every two days to avoid detection. Jane Doe No. 1 appeared on some 300 ads on Backpage and was raped over 1,000 times.

Backpage listed each ad featuring Jane Doe No. 1 as an offer of "escort" services, a common euphemism for prostitution. The Jane Doe No. 1 ads included known signifiers for child prostitution such as "young," "girl," "fresh," "tiny," "roses," and "party." Jane Doe No. 1's pimp provided a prepaid mobile phone and a prepaid credit card to conceal Jane Doe No. 1's identity when Jane Doe No. 1 placed ads on Backpage. When Jane Doe No. 1 attempted to enter her true age (which was under 18) during the purchase of an ad, Backpage would instruct her to enter her age as 18 or older. Photographs of Jane Doe No. 1 (with her facial features obscured, but at least on one occasion displaying a unique tattoo) accompanied all of her ads.

Jane Doe No. 2 was trafficked on Backpage by her pimp during various periods between 2010 and 2012 at different locations in Massachusetts. She first appeared on Backpage when she was 15 years old, after she had

absconded from a residential program. Ads featuring Jane Doe No. 2 were posted either by her pimp or an older woman who worked with him (his "bottom"). The ads would appear on Backpage on average six times a day. Jane Doe No. 2 was given a prepaid mobile phone to answer calls from would-be customers generated by the Backpage ads. As a result of the ads, she was coerced into 5-15 sex transactions every day. Like the ads of Jane Doe No. 1, those of Jane Doe No. 2 featured her photograph. The ads were placed using a prepaid credit card. Altogether, Jane Doe No. 2 was raped over 900 times while in the thrall of her pimp.

Jane Doe No. 3 was trafficked on Backpage in December of 2013 by her pimp and one or more of his associates. The Backpage solicitations for the underage Jane Doe No. 3 described her as "new," "sweet," and "playful." As with the other Jane Does, the ads were paid for with a prepaid credit card. Jane Doe No. 3 was also given a mobile phone to take calls and texts from customers. She was taken to a hotel in Foxborough, Massachusetts, where she was raped by men who responded to the ads. Photos of Jane Doe No. 3,

including one that she had taken of herself, appeared with the ads on Backpage.²

The Doe plaintiffs brought this lawsuit in October of 2014. In their Second Amended Complaint, they allege that defendants' business practices violate the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 18 U.S.C. § 1595 (Count I); the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010 (MATA), Mass. Gen. Laws ch. 265, § 50 (Count II); and constitute unfair and deceptive business practices under the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, § 9 (Count III). The Doe plaintiffs also bring claims for unauthorized use of pictures of a person, Mass. Gen. Laws. ch. 214, § 3A and R.I. Gen. Laws § 9-1-28 (Count IV), and copyright infringement (specific to the photograph taken by Jane Doe No. 3 of herself) (Count V). In January of 2015, defendants moved to dismiss the Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The parties and several amici curiae³ filed helpful briefs. The court heard oral argument on April 15, 2015.

² At some point, Jane Doe No. 3's parents became aware of the ads featuring their daughter on Backpage and demanded that they be taken down. A week later, the illicit ads still appeared on the website.

³ The City and County of San Francisco, the City of Atlanta, the City and County of Denver, the City of Houston, the City of Philadelphia, and the City of Portland (Oregon) (collectively the local government amici) and the

DISCUSSION

To survive a Rule 12(b)(6) motion to dismiss, the factual allegations of a complaint must “possess enough heft” to set forth “a plausible entitlement to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 559 (2007); *see also Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir. 2008). As the Supreme Court has emphasized, this standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted).

Defendants rely primarily on the immunity provided by Congress in enacting 47 U.S.C. § 230, that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” *id.* § 230(c)(1), and the concomitant preemption of “cause[s] of action . . . brought

Commonwealth of Massachusetts submitted two amicus briefs in support of plaintiffs. The Electronic Frontier Foundation, the Center for Democracy & Technology, and Professor Eric Goldman (of Santa Clara University School of Law) (collectively EFF) submitted an amicus brief in support of defendants.

... under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).⁴ There is no dispute that defendants are, as the operators of Backpage, providers of an interactive computer service. Defendants contend that because the Doe plaintiffs allege they were harmed by the contents of postings that defendants had no part in creating, the claims fall squarely within Congress’s exemption of interactive computer service providers from liability for third-party Internet content.

Congress enacted section 230 in 1996, while the Internet was still in its infancy. Congress explained the purposes of the law in five pertinent findings:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

⁴ The Doe plaintiffs argue that the court should first assess the plausibility and sufficiency of the factual allegations relevant to each claim before reaching the immunity issue. However, the entitlement to immunity under section 230 is not only an affirmative defense, but also the right to be immune from being sued. *See, e.g., Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); *accord Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (Section 230 “can [] support a motion to dismiss if the statute’s barrier to suit is evident from the face of the complaint.”); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (same). As the Supreme Court counsels, a claim of entitlement to immunity should be “resolv[ed] . . . at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

47 U.S.C. § 230(a). Consistent with these findings, section 230 reflects the “policy of the United States”

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Id. § 230(b).

The Doe plaintiffs argue that because the Internet has matured since the enactment of section 230, the principal policy consideration that animated Congress (promoting the growth of the Internet by insulating it from regulatory restrictions and lawsuits) no longer has the assuasive force that it may once have had. They cite the characterization of section 230's immunity guarantee as an affirmative defense in cases like *Klayman* and *Ricci* as evidence that the courts have been whittling back the scope of section 230 immunity as the Internet has shed its training wheels. *See Klayman*, 753 F.3d at 1357; *Ricci*, 781 F.3d at 28. The argument, however, does not bear scrutiny. Both the *Klayman* and *Ricci* courts, whatever the label they used to describe section 230's effect, found the interactive computer service providers at issue to be immune from any imputation of liability for third-party speech. *Klayman*, 753 F.3d at 1357-1359; *Ricci*, 781 F.3d at 27-28. Moreover, Congress, far from lowering the immunity bar, ratcheted it up in

2010 by expanding the scope of section 230 immunity to preempt the enforcement of inconsistent foreign judgments. *See* 28 U.S.C. § 4102(c)(1).⁵

The local government amici attempt to repackage Backpage as an “information content provider,” an entity that section 230 defines as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3). Their ultimate point is that information content providers are excluded from the immunity granted by section 230. The amici contend that Backpage generates content by: (1) posting illegal materials in sponsored ads; (2) stripping metadata from posted photos; (3) coaching the crafting of ads by allowing misspellings of suggestive terms; and (4) designing the escorts section of the website in such a way as to signal to readers that sex with children is sold here. The amici argument relies heavily on *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008). In that case, the Ninth

⁵ Section 4102(c)(1) reads as follows: “Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation against the provider of an interactive computer service, as defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230) unless the domestic court determines that the judgment would be consistent with section 230 if the information that is the subject of such judgment had been provided in the United States.”

Circuit determined Roommates.com, a roommate matching service, to be an “information content provider” shorn of section 230 immunity because it elicited information about personal characteristics of users that is forbidden by the Fair Housing Act. *Id.* at 1169-1170. The Court reasoned that

Roommate’s connection to the discriminatory filtering process is direct and palpable: Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children. Roommate selected the criteria used to hide listings, and Councils allege that the act of hiding certain listings is itself unlawful under the Fair Housing Act, which prohibits brokers from steering clients in accordance with discriminatory preferences.

Id.

To get to its result, the Court in *Roommates* attempted to draw a line between active control of the content of a web posting and the provision of a neutral interactive service that simply replicates offending third-party matter.⁶

If an individual uses an ordinary search engine to query for a “white roommate,” the search engine has not contributed to any alleged unlawfulness in the individual’s conduct; providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to “development” for purposes of the immunity exception. . . . Similarly, a housing website that allows users to specify whether they will or will not receive emails by means of *user-defined* criteria might help some users exclude email from

⁶ *Roommates* is one of the few sentinels denying section 230 immunity left standing among some 300 cases (as of 2012) that have decided the issue. See *Hill v. StubHub, Inc.*, 219 N.C. App. 227, 239 (2012).

other users of a particular race or sex. However, that website would be immune, so long as it does not **require** the use of discriminatory criteria. A website operator who edits user-created content – such as by correcting spelling, removing obscenity or trimming for length – retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality.

Id. at 1169 (bold emphasis added). This latter passage lays out the distinction that afforded immunity to craigslist.com, an online classifieds forum that also published discriminatory housing ads. “Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination; for example, craigslist does not offer a lower price to people who include discriminatory statements in their postings.” *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-672 (7th Cir. 2008).

Singly or in the aggregate, the allegedly sordid practices of Backpage identified by amici amount to neither affirmative participation in an illegal venture nor active web content creation. Nothing in the escorts section of Backpage requires users to offer or search for commercial sex with children. The existence of an escorts section in a classified ad service, whatever its social merits, is not illegal. The creation of sponsored ads with excerpts taken from the original posts reflects the illegality (or legality) of the original posts and nothing more. Similarly, the automatic generation of navigational

path names that identify the ads as falling within the “escorts” category is not content creation. *See Seldon v. Magedson*, 2014 WL 1456316, at *5-6 (D. Ariz. April 15, 2014). The stripping of metadata from photographs is a standard practice among Internet service providers. Hosting anonymous users and accepting payments from anonymous sources in Bitcoins, peppercorns, or whatever, might have been made illegal by Congress, but it was not. Backpage’s passivity and imperfect filtering system may be appropriate targets for criticism, but they do not transform Backpage into an information content provider.

Although the Doe plaintiffs recognize that defendants did not author the content of the offending ads, *see* Opp’n at 16 (“Plaintiffs’ trafficking claims do not seek to ‘impute’ to [d]efendants any advertisements created by others”), they challenge the breadth of the immunity sought by defendants. Count I alleges a violation of a section of the TVPRA, a federal statute that criminalizes sex trafficking. As the Doe plaintiffs note, section 230 expressly states that “[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or *any other Federal criminal statute.*” 47 U.S.C. § 230(e)(1) (emphasis added). Plaintiffs contend that defendants’ business practices, “even if the

advertisements had never been posted,” Opp’n at 16, are sufficient to make out a violation of the TVPRA. Furthermore, according to the Doe plaintiffs, section 230 only immunizes “action voluntarily taken in *good faith* to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” 47 U.S.C. § 230(c)(2)(A) (emphasis added). The Doe plaintiffs argue that their claims are of a different sort – they allege that defendants have intentionally and in bad faith hidden behind ineffectual counter-trafficking measures to deflect the scrutiny of law enforcement and social services agencies. Count II alleges a violation of the MATA, the Massachusetts analog to the TVPRA. The Doe plaintiffs argue that, because claims under the TVPRA are exempt from the scope of section 230’s immunity, the claim under MATA does not depend on “*inconsistent* state law” preempted by section 230. Count III, which presses a claim of unfair and deceptive businesses practices under Massachusetts law, is alleged to arise not from the posted ads and their contents, but from the architecture of Backpage itself, which the Doe plaintiffs contend is constructed to conceal illegal activity from law enforcement. Finally, the Doe plaintiffs rely on Congress’s stricture that section 230 “shall not be construed to limit or expand any law pertaining to

intellectual property," *id.* § 230(e)(2), as preserving the intellectual property claims (unauthorized publicity and copyright infringement).⁷ I will examine the viability of each count in turn.

Civil Remedy under the TVPRA

18 U.S.C. § 1595 provides victims of trafficking the right to bring a private civil action for restitution against "whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter." The parties dispute whether a civil action authorized by a criminal statute can be construed as "enforcement of . . . a Federal criminal statute" exempt from the immunity provided by section 230(e)(1).⁸

⁷ Defendants do not rely on section 230 immunity with respect to the copyright infringement claim, but contend, to be discussed *infra*, that it should be dismissed on other grounds.

⁸ The Doe plaintiffs, citing *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), also contend that their TVPRA claim falls outside of the protections of section 230 immunity because section 1595 imposes a duty of care on defendants wholly independent of their role as publishers of speech. In *Barnes*, the Ninth Circuit barred a negligent undertaking claim under Oregon law that sought to hold Yahoo liable for an alleged failure to remove indecent profiles of a plaintiff that had been posted by her ex-boyfriend because the claim attempted to impose publisher liability on Yahoo for content created by a third party. *Id.* at 1102-1105 ("The word 'undertaking,' after all, is meaningless without the following verb. That is, one does not

The Doe plaintiffs maintain that the statutory language, “enforce[ing] . . . a Federal criminal statute,” implies more than a dependence on criminal prosecution alone. *See* Black’s Law Dictionary (10th ed. 2014) (to “enforce” is “[t]o give force or effect to” or “[l]oosely, to compel a person to pay damages for not complying with”). Further, plaintiffs contend that civil actions are frequently authorized as part and parcel of the enforcement regime behind criminal statutes. *See Luka v. Procter & Gamble Co.*, 785 F. Supp. 2d 712, 719 (N.D. Ill. 2011) (“[C]ivil enforcement mechanisms [] permit private parties to sue *to enforce* statutory

merely undertake; one undertakes *to do* something. And what is the undertaking that Barnes alleges Yahoo failed to perform with due care? The removal of the indecent profiles that her former boyfriend posted on Yahoo’s website. But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove.”).

The Court did, however, allow a claim of promissory estoppel to stand on the allegation that a Director of Communications at Yahoo had contacted plaintiff and promised to remove the offending ads, but failed to do so in a timely manner. *Id.* at 1107-1109. “Contract liability here would come not from Yahoo’s publishing conduct, but from Yahoo’s manifest intention to be legally obligated to do something, which happens to be removal of material from publication.” *Id.* at 1107. There is no claim by the Doe plaintiffs that any such assurance was given to them by Backpage. As *Barnes* illustrates, the existence of a statutory remedy without more does not give rise *mirabile dictu* to a tort duty. If it did, there would no need to create such a remedy in the first place.

prohibitions." (emphasis added)). Plaintiffs also rely on *dicta* in *Nieman v. Versuslaw, Inc.*, 2012 WL 3201931, at *9 (C.D. Ill. Aug. 3, 2012), surmising that section 230 "arguably . . . may not be used to bar a civil RICO claim because that would impair the enforcement of a Federal criminal statute."

Defendants, for their part, point out that courts have consistently rejected this argument in a section 230 immunity context. In *Doe v. Bates*, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006), the court held that Yahoo could not be held civilly liable for allegedly knowingly hosting child pornography on a user site styled as the Candyman e-group. The Magistrate Judge examined "th[is] issue of first impression" in scholarly detail that is worth quoting at length. *Id.*, at *3.

The plain text of the statute establishes that the 230(e)(1) exception does not encompass private civil claims. As argued by Defendant, the common definition of the term "criminal," as well as its use in the context of Section 230(e)(1), specifically excludes and is distinguished from civil claims. The term "criminal" is defined as "[c]onnected with the administration of penal justice." Black's Law Dictionary 302; *see also* American Heritage Dictionary of the English Language 430 (4th ed. 2000) (defining "criminal" as "[r]elating to the administration of penal law"). The term "civil" is defined as follows: "[o]f or relating to private rights and remedies that are sought by action or suit, *as distinct from criminal proceedings.*" Black's Law Dictionary 262 (emphasis added). In addition, Congress' use of the word "enforcement" in Section 230(e)(1) again confirms that the exception refers to governmental action, not civil actions by a private litigant.

Congress did not bifurcate any statutes as asserted by Plaintiffs. Rather, as noted by Defendant, it preserved the ability of law enforcement officials to enforce the federal criminal laws to their fullest extent while at the same time eliminating the ability of private plaintiffs to pursue service-provider defendants. Given the complexity of Title 18 and the availability of civil remedies in statutes throughout the criminal code, Congress achieved its intended result using simple language making it clear that Section 230's limits on civil liability would not affect governmental enforcement of federal criminal laws.

As noted by Defendant, Plaintiffs' invocation of Section 230(e)(1) rests on their generalized policy arguments rather than the text of the statute. Plaintiffs' core argument appears to be that Section 230(e)(1) must exempt civil claims under the child pornography statutes because child pornography is "not to be tolerated" and "[i]f the prospect of civil liability provides a disincentive for engaging in child pornography over and above that provided by the prospect of fines and jail time, then that is a good thing."

Child pornography obviously is intolerable, but civil immunity for interactive service providers does not constitute "tolerance" of child pornography any more than civil immunity from the numerous other forms of harmful content that third parties may create constitutes approval of that content. Section 230 does not limit anyone's ability to bring criminal or civil actions against the actual wrongdoers, the individuals who actually create and consume the child pornography. Here, both the neighbor [who created the child pornography] and the moderator of the Candyman web site have been prosecuted and are serving sentences in federal prison. Further, the section 230(e)(1) exemption permits law enforcement authorities to bring criminal charges against even interactive service providers in the event that they themselves actually violate federal criminal laws.

Regarding civil liability, however, Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider's actions violated the criminal laws. As

Defendant explained in its briefing, the reason is evident. If civil liability were possible, the incentive to bring a civil claim for the settlement value could be immense, even if a plaintiff's claim was without merit. Even if it ultimately prevailed, the service provider would face intense public scrutiny and substantial expense. Given the millions of communications that a service provider such as Defendant enables, the service provider could find itself a defendant in numerous such cases. Congress determined that it wanted to eliminate the resulting disincentives to the development of vibrant and diverse services involving third-party communication, while maintaining the ability of criminal prosecutions by the government for violations of federal criminal law. In sum, Congress did intend to treat civil and criminal claims differently and carefully crafted Section 230(e)(1) to achieve exactly that result. Plaintiffs' claim, although novel, is untenable and without merit.

Id., at *21-22.

The District Judge adopted the Magistrate Judge's opinion, also noting that

[t]he legislative history [] buttresses the Congressional policy against civil liability for internet service providers. One key proponent of an amendment containing the language of § 230 at issue explained that "the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so." 141 Cong. Rec. H8469. Several legislators identified "obscenity" in particular as material that could be more freely regulated as a result of the immunity provided by the statute. Another proponent noted that "[t]here is no way that any of [the internet service providers], like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. . . . We are talking about . . . thousands of pages of information every day, and to have that imposition imposed on them is wrong." *Id.* at H8471. The House approved the amendment by a vote of 410 to 4. *Id.* at H8478.

Id., at *4. The court concluded that on the basis of this legislative history, “Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider’s actions violated the criminal laws.” *Id.*, at *5.

In *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), the court adopted the reasoning of *Bates* and rejected the *identical* argument from plaintiff, a victim of child sex trafficking, that section 230 carved out an exemption for the civil claim that she had brought against Backpage under 18 U.S.C. § 1595. *Id.* at 1055-1056. Similarly, in *Obado v. Magedson*, 2014 WL 3778261 (D.N.J. July 31, 2014), the court rejected plaintiff’s effort to claim private redress for defendants’ alleged criminal conspiracy to violate his rights. *Id.*, at *8. “Even if Plaintiff had alleged any facts to sustain this claim, the CDA exception for federal criminal statutes applies to government prosecutions, not to civil private rights of action under stat[utes] with criminal aspects.” *Id.*

Although the Doe plaintiffs challenge this line of cases as “flawed,” the court is persuaded that criminal and civil actions differ in kind and that section 230 exempts only criminal prosecutions. Section 1595 itself recognizes that although a private right of action may be complementary to

government interests in combating trafficking, a civil action primarily vindicates private interests and must take a back seat to a criminal prosecution. *See* 18 U.S.C. § 1595(b)(1) (“Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.”). The court also finds persuasive amici EFF’s argument that only criminal prosecutions are exempted from section 230’s immunity because they are subject to the filter of prosecutorial discretion and a heightened standard of proof, making them less likely to have a chilling effect on the freedom of online speech.⁹

The Doe plaintiffs’ next argument, that section 230 only immunizes “good faith” efforts to restrict access to offensive materials, has also failed to find support in the decided cases. Section 203(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Section 230(c)(2) further provides that

⁹ Defendants also contend that plaintiffs fail to make out a case under 18 U.S.C. § 1595 because they do not allege that defendants shared the traffickers’ criminal intent. Plaintiffs counter that section 1595 imposes liability not only for aiding and abetting, but more broadly for “*participation* in a venture which that person knew or should have known has engaged in an act in violation of this chapter.” *Id.* § 1595(a) (emphasis added). The court need not decide this issue because it holds that this claim is preempted by section 230 immunity.

[n]o provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Where section 230(c)(1) exempts an interactive service provider from liability for publishing third-party content, section 230(c)(2) also immunizes these providers from liability for actions taken in good faith to restrict offensive content.

[Section] 230(c)(1) contains no explicit exception for impermissible editorial motive, whereas § 230(c)(2) does contain a “good faith” requirement for the immunity provided therein. That § 230(c)(2) expressly provides for a good faith element omitted from § 230(c)(1) indicates that Congress intended not to import a subjective intent/good faith limitation into § 230(c)(1). “[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Keene Corp. v. United States*, 508 U.S. 200, 208 [] (1993). Accordingly, the text of the two subsections of § 230(c) indicates that (c)(1)’s immunity applies regardless of whether the publisher acts in good faith.

Levitt v. Yelp! Inc., 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014).¹⁰

Unfair and Deceptive Business Practices

The Doe plaintiffs contend that the claim for unfair and deceptive business practices under the Massachusetts Consumer Protection Act, Gen. Laws ch. 93, § 9, survives section 230 immunity because it does not depend on the content of the advertisements themselves, but rather on the “deceptive” design of Backpage. Without the offending ads, however, no nexus would exist between Backpage and the harms suffered by the Doe plaintiffs. Their theory – that absent the permissive website design and imperfect filtering, their pimps would not have trafficked them or, if they had attempted to do so, law enforcement would have scrutinized Backpage more closely and would possibly have intervened to prevent their injuries – is too speculative to fall as a matter of law within the penumbra of reasonably foreseeability.

Moreover, courts have repeatedly rejected this “entire website” theory as inconsistent with the substance and policy of section 230. In *Universal*

¹⁰ Because the CDA immunizes Backpage from private litigants seeking redress under civil law, the parallel state law claim under the MATA is necessarily inconsistent with, and therefore preempted by, the CDA.

Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007), the First Circuit refused to hold Lycos (a search engine) liable for the "construct and operation" of its website. *Id.* at 422. "Lycos's decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting. Section 230 immunity does not depend on the form that decision takes." *Id.*; see also *StubHub, Inc.*, 219 N.C. App. at 245 (rejecting the "entire website" approach in determining whether the Internet ticket marketplace may be held responsible for scalpers' unfair or deceptive trade practices); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (finding a "structure and design" approach inapplicable where, unlike in *Roommates*, the design of website did not "require[] users to input illegal content as a necessary condition of use.").¹¹

Also problematic is the suggestion that either knowledge or tacit encouragement of illegal content (but not the content itself) can be the basis

¹¹ Court have also rejected consumer protection claims under section 230(c)(1) that seek to hold interactive service providers liable for third-party content. See, e.g., *Lycos*, 478 F.3d at 421-422 (Florida securities and cyberstalking laws); *Hinton v. Amazon.com*, 2014 WL 6982628, at *1 (S.D. Miss. Dec. 9, 2014) (Mississippi Consumer Protection Act); *Obado*, 2014 WL 3778261, at *1 (New Jersey Consumer Fraud Act); *Goddard v. Google*, 2008 WL 5245490, at *1 (N.D. Cal. Dec. 17, 2008) (California Unfair Competition Law).

for interactive web services liability. “It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider’s own speech.” *Lycos*, 478 F.3d at 420; *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (“The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law.”). Moreover,

there is simply no authority for the proposition that [encouraging the publication of defamatory content] makes the website operator responsible, in whole or in part, for the ‘creation or development’ of every post on the site. . . . Unless Congress amends the [CDA], it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, or how they might use it to their advantage.

Ascentive, LLC v. Opinion Corp., 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011)

(internal quotation marks omitted, ellipsis in original). Indeed,

an encouragement test would inflate the meaning of “development” to the point of eclipsing the immunity from publisher-liability that Congress established. Many websites not only allow but also actively invite and encourage users to post particular types of content. Some of this content will be unwelcome to others – *e.g.*, unfavorable reviews of consumer products and services, allegations of price gouging, complaints of fraud on consumers, reports of bed bugs, collections of cease-and-desist notices relating to online speech. And much of this content is commented upon by the website operators who make the forum available. Indeed, much of it is “adopted” by website operators, gathered into reports, and republished online. Under an encouragement test of development, these websites would lose the immunity under the CDA and be subject to hecklers’ suits aimed at the publisher. Moreover, under the district court’s

rule, courts would then have to decide what constitutes “encouragement” in order to determine immunity under the CDA – a concept that is certainly more difficult to define and apply than the Ninth Circuit’s material contribution test. *See Zeran*, 129 F.3d at 333. Congress envisioned an uninhibited, robust, and wide-open internet, *see* § 230(a)(1)-(5), but the muddiness of an encouragement rule would cloud that vision. Accordingly, other courts have declined to hold that websites were not entitled to the immunity furnished by the CDA because they selected and edited content for display, thereby encouraging the posting of similar content.

Jones v. Dirty World Entm’t Recordings LLC, 755 F.3d 398, 414-415 (6th Cir. 2014).¹²

Right of Publicity

Mass. Gen. Laws ch. 214, § 3A, provides that

[a]ny person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use.

R.I. Gen. Laws § 9-1-28 provides in almost identical language that

[a]ny person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent

¹² Defendants also argue that the Chapter 93A claim, in so far as it is based on alleged misrepresentations to law enforcement and social services agencies, lacks an essential foundational element because law enforcement and social services agencies have no connection in a commercial context to defendants as “consumers” of goods and services.

may bring an action in the superior court against the person so using his or her name, portrait, or picture to prevent and restrain the use thereof, and may recover damages for any injuries sustained by reason of such use.

Accepting, *dubitante*, the Doe plaintiffs' assertion that the right to publicity constitutes an intellectual property claim exempt from immunity under section 230,¹³ the court agrees with defendants that plaintiffs have not pled

¹³ Although certain publicity rights are akin to "intellectual property" rights, a person's image is not a "product of the human intellect." Black's Law Dictionary (10th ed. 2014). "[T]he right of publicity flows from the right to privacy," *Alvarez Guedes v. Marcano Martinez*, 131 F. Supp. 2d 272, 278 (D.P.R. 2001) (citing numerous cases), which is an intangible right of a different nature. Despite the Doe plaintiffs' attorney's contention at oral argument that a photograph may be copyrightable, it does not follow that the underlying image is *ipso facto* protectable under intellectual property law. See *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1264 (10th Cir. 2008) ("Recognizing that Oscar Wilde's inimitable visage does not belong, or 'owe its origins' to any photographer, the Supreme Court noted that photographs may well sometimes lack originality and are thus not *per se* copyrightable. . . . [P]hotographs are copyrightable, if only to the extent of their *original* depiction of the subject. Wilde's image is not copyrightable; but to the extent a photograph reflects the photographer's decisions regarding pose, positioning, background, lighting, shading, and the like, those elements can be said to 'owe their origins' to the photographer, making the photograph copyrightable, at least to that extent."), citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884). Courts also disagree as to whether state law intellectual property claims are exempted under section 230. Compare *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) ("In the absence of a definition from Congress, we construe the term 'intellectual property' to mean 'federal intellectual property.'") with *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008)

plausible claims for unauthorized use of their images. Plaintiffs do not allege that defendants used their images to extract any direct benefit (such as featuring plaintiffs on advertisements *for* Backpage). Rather, the allegation is that defendants benefitted incidentally from the fee charged for posting advertisements with the Doe plaintiffs' pictures in the escorts section of the website. The argument, however, has been explicitly rejected by the Massachusetts Supreme Judicial Court.¹⁴

[T]he crucial distinction under G.L. c. 214, s 3A, must be between situations in which the defendant makes an incidental use of the plaintiff's name, portrait or picture and those in which the defendant uses the plaintiff's name, portrait or picture deliberately to exploit its value for advertising or trade purposes.

Tropeano v. Atl. Monthly Co., 379 Mass. 745, 749 (1980). "'The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.'"

("[Section] 230(e)(2) applies simply to 'any law pertaining to intellectual property,' not just federal law.").

¹⁴ "[A]s a federal court considering state law claims, we must apply the state's law on substantive issues and 'we are bound by the teachings of the state's highest court.'" *Phoung Luc v. Wyndham Mgmt. Corp.*, 496 F.3d 85, 88 (1st Cir. 2007), *citing N. Am. Specialty Ins. Co. v. Lapalme*, 258 F.3d 35, 37-38 (1st Cir. 2001).

Id., quoting *Nelson v. Maine Times*, 373 A.2d 1221, 1224 (Me. 1977) (in turn quoting Restatement (Second) of Torts § 652C, cmt. d (1977)); *see also Intercity Maint. Co. v. Local 254 Serv. Employees Int’l Union*, 62 F. Supp. 2d 483, 506 (D.R.I. 1999), *aff’d in part, vacated in part on other grounds, remanded sub nom. Intercity Maint. Co. v. Local 254, Serv. Employees Int’l Union AFL-CIO*, 241 F.3d 82 (1st Cir. 2001) (“The Rhode Island legislature borrowed the Privacy Act’s scheme of four privacy torts, including the tort of false light, from the doctrine of privacy torts promulgated by the *Restatement (Second) of Torts*. *See Liu v. Striuli*, 36 F. Supp. 2d 452, 479 (D.R.I. 1999); *Restatement (Second) of Torts* §§ 652B-E (establishing the four privacy torts). Accordingly, Rhode Island courts have often turned to the *Restatement* as an authority on the matter of privacy torts.”).

Copyright Infringement

Jane Doe No. 3 obtained a registration for her photograph on December 18, 2014, after this lawsuit was filed. Although registration is not a jurisdictional prerequisite of bringing a suit for copyright infringement, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010), it is a “condition precedent for obtaining certain remedies, such as statutory damages and attorneys’ fees.” *Johnson v. Gordon*, 409 F.3d 12, 20 (1st Cir. 2005); *see also* 17 U.S.C § 412 (“[N]o award of statutory damages or of attorney’s fees . . .

shall be made for – (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration.”).

The only recovery remaining open to Jane Doe No. 3 is compensatory damages under 17 U.S.C. § 504. Section 504 permits recovery of “the actual damages suffered by [] her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” With respect to the latter, Jane Doe No. 3 alleges that “[t]he Backpage Defendants derive a financial benefit directly attributable to the public display of such photographs by virtue of the payment of fees by the pimps and traffickers to Backpage.com.” SAC ¶ 139. However, she may only recover profits from defendants that are causally linked to specific acts of infringement. *See On Davis v. The Gap, Inc.*, 246 F.3d 152, 159-161 (2d Cir. 2001). Here no plausible link exists between defendants’ generalized profits and any common-law copyright vesting in Jane Doe No. 3’s photo for the simple reason that the fee for posting an ad is the same whether or not it includes a photograph. Jane Doe No. 3 does not allege that she suffered any loss of revenues or licensing fees for her photo as a result of the infringement (nor does she allege that the protectable elements of the photo, *see* n.12 *supra*, have any market value).

Because she does not plead any redressable damages, Jane Doe No. 3's copyright infringement claim must also be dismissed.

To avoid any misunderstanding, let me make it clear that the court is not unsympathetic to the tragic plight described by Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3. Nor does it regard the sexual trafficking of children as anything other than an abhorrent evil. Finally, the court is not naïve – I am fully aware that sex traffickers and other purveyors of illegal wares ranging from drugs to pornography exploit the vulnerabilities of the Internet as a marketing tool. Whether one agrees with its stated policy or not (a policy driven not simply by economic concerns, but also by technological and constitutional considerations), Congress has made the determination that the balance between suppression of trafficking and freedom of expression should be struck in favor of the latter in so far as the Internet is concerned. Putting aside the moral judgment that one might pass on Backpage's business practices, this court has no choice but to adhere to the law that Congress has seen fit to enact.

ORDER

For the foregoing reasons, defendants' motion to dismiss the Second Amended Complaint is ALLOWED. The Clerk is directed to enter judgment accordingly and close this case.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOE ET AL

Plaintiff

V.

CIVIL ACTION

NO. 14CV13870-RGS

BACKPAGE.COM

Defendant

JUDGMENT

STEARNS, D.J.,

In accordance with the Court's Memorandum and Order dated 5/15/15
_____ granting defendant's motion to dismiss, it is hereby ORDERED that judgment be
entered for defendant.

By the Court,

5/15/15

Date

/s/ Elaine Flaherty

Deputy Clerk



United States Code Annotated

Title 47. Telecommunications (Refs & Annos)

Chapter 5. Wire or Radio Communication (Refs & Annos)

Subchapter II. Common Carriers (Refs & Annos)

Part I. Common Carrier Regulation

47 U.S.C.A. § 230

§ 230. Protection for private blocking and screening of offensive material

Effective: October 21, 1998

[Currentness](#)

(a) Findings

The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).¹

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of [section 223](#) or [231](#) of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 230, as added [Pub.L. 104-104, Title V, § 509](#), Feb. 8, 1996, 110 Stat. 137; [Pub.L. 105-277](#), Div. C, Title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681-739.)

[Notes of Decisions \(89\)](#)

Footnotes

[1](#) So in original. Probably should be “subparagraph (A)”.

47 U.S.C.A. § 230, 47 USCA § 230

Current through P.L. 114-49 approved 8-7-2015

End of Document

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United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 77. Peonage, Slavery, and Trafficking in Persons (Refs & Annos)

18 U.S.C.A. § 1591

§ 1591. Sex trafficking of children or by force, fraud, or coercion

Effective: May 29, 2015

[Currentness](#)

(a) Whoever knowingly--

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is--

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “coercion” means--

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.

(4) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(5) The term “venture” means any group of two or more individuals associated in fact, whether or not a legal entity.

CREDIT(S)

(Added [Pub.L. 106-386](#), Div. A, § 112(a)(2), Oct. 28, 2000, 114 Stat. 1487; amended [Pub.L. 108-21, Title I, § 103\(a\)\(3\)](#), Apr. 30, 2003, 117 Stat. 653; [Pub.L. 108-193](#), § 5(a), Dec. 19, 2003, 117 Stat. 2879; [Pub.L. 109-248, Title II, § 208](#), July 27, 2006, 120 Stat. 615; [Pub.L. 110-457, Title II, § 222\(b\)\(5\)](#), Dec. 23, 2008, 122 Stat. 5069; [Pub.L. 114-22, Title I, §§ 108\(a\), 118\(b\)](#), May 29, 2015, 129 Stat. 238, 247.)

[Notes of Decisions \(51\)](#)

18 U.S.C.A. § 1591, 18 USCA § 1591

Current through P.L. 114-49 approved 8-7-2015

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United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 77. Peonage, Slavery, and Trafficking in Persons (Refs & Annos)

18 U.S.C.A. § 1595

§ 1595. Civil remedy

Effective: May 29, 2015

[Currentness](#)

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a “criminal action” includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under this section unless it is commenced not later than the later of--

(1) 10 years after the cause of action arose; or

(2) 10 years after the victim reaches 18 years of age, if the victim was a minor at the time of the alleged offense.

CREDIT(S)

(Added [Pub.L. 108-193](#), § 4(a)(4)(A), Dec. 19, 2003, 117 Stat. 2878; amended [Pub.L. 110-457, Title II, § 221\(2\)](#), Dec. 23, 2008, 122 Stat. 5067; [Pub.L. 114-22, Title I, § 120](#), May 29, 2015, 129 Stat. 247.)

[Notes of Decisions \(13\)](#)

18 U.S.C.A. § 1595, 18 USCA § 1595

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Massachusetts General Laws Annotated

Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)

Title I. Crimes and Punishments (Ch. 263-274)

Chapter 265. Crimes Against the Person (Refs & Annos)

M.G.L.A. 265 § 50

§ 50. Trafficking of persons for sexual servitude; trafficking of persons under 18 years for sexual servitude; trafficking by business entities; penalties; tort actions brought by victims

Effective: February 19, 2012

[Currentness](#)

(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

(b) Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of persons for sexual servitude shall be civilly liable for an offense under this section.

Credits

Added by [St.2011, c. 178, § 23, eff. Feb. 19, 2012](#).

[Notes of Decisions \(1\)](#)

M.G.L.A. 265 § 50, MA ST 265 § 50

Current through Chapter 75 of the 2015 1st Annual Session

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XV. Regulation of Trade (Ch. 93-110h)

Chapter 93A. Regulation of Business Practices for Consumers Protection (Refs & Annos)

M.G.L.A. 93A § 2

§ 2. Unfair practices; legislative intent; rules and regulations

Currentness

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act ([15 U.S.C. 45\(a\)\(1\)](#)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of [15 U.S.C. 45\(a\)\(1\)](#) (The Federal Trade Commission Act), as from time to time amended.

Credits

Added by St.1967, c. 813, § 1. Amended by St.1978, c. 459, § 2.

[Notes of Decisions \(1256\)](#)

M.G.L.A. 93A § 2, MA ST 93A § 2

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Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XV. Regulation of Trade (Ch. 93-110h)

Chapter 93A. Regulation of Business Practices for Consumers Protection (Refs & Annos)

M.G.L.A. 93A § 9

§ 9. Civil actions and remedies; class action; demand for relief; damages; costs; exhausting administrative remedies

Effective: August 9, 2004

Currentness

(1) Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action in the superior court, or in the housing court as provided in [section three of chapter one hundred and eighty-five C](#) whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

(2) Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such manner as the court directs.

(3) At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. In all other cases, if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The demand requirements of this paragraph shall not apply if the claim is asserted by way of counterclaim or cross-claim, or if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth, but such respondent may otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section. Notwithstanding any other provision to the contrary, if the court finds any method, act or practice unlawful with

regard to any security or any contract of sale of a commodity for future delivery as defined in section two, and if the court finds for the petitioner, recovery shall be in the amount of actual damages.

(3A) A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as herein provided. The demand requirements and provision for tender of offer of settlement provided in paragraph (3) shall also be applicable under this paragraph, except that no rights to equitable relief shall be created under this paragraph, nor shall a person asserting a claim hereunder be able to assert any claim on behalf of other similarly injured and situated persons as provided in paragraph (2).

(4) If the court finds in any action commenced hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action; provided, however, the court shall deny recovery of attorney's fees and costs which are incurred after the rejection of a reasonable written offer of settlement made within thirty days of the mailing or delivery of the written demand for relief required by this section.

<[There is no paragraph (5).]>

(6) Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action under this section or to obtain injunctive relief or recover damages or attorney's fees or costs or other relief as provided in this section. Failure to exhaust administrative remedies shall not be a defense to any proceeding under this section, except as provided in paragraph seven.

(7) The court may upon motion by the respondent before the time for answering and after a hearing suspend proceedings brought under this section to permit the respondent to initiate action in which the petitioner shall be named a party before any appropriate regulatory board or officer providing adjudicatory hearings to complainants if the respondent's evidence indicates that:

(a) there is a substantial likelihood that final action by the court favorable to the petitioner would require of the respondent conduct or practices that would disrupt or be inconsistent with a regulatory scheme that regulates or covers the actions or transactions complained of by the petitioner established and administered under law by any state or federal regulatory board or officer acting under statutory authority of the commonwealth or of the United States; or

(b) that said regulatory board or officer has a substantial interest in reviewing said transactions or actions prior to judicial action under this chapter and that the said regulatory board or officer has the power to provide substantially the relief sought by the petitioner and the class, if any, which the petitioner represents, under this section.

Upon suspending proceedings under this section the court may enter any interlocutory or temporary orders it deems necessary and proper pending final action by the regulatory board or officer and trial, if any, in the court, including issuance of injunctions, certification of a class, and orders concerning the presentation of the matter to the regulatory board or officer. The court shall issue appropriate interlocutory orders, decrees and injunctions to preserve the status quo between the parties pending final action by the regulatory board or officer and trial and shall stay all proceedings in any court or before any regulatory board or officer in which petitioner and respondent are necessarily involved. The court may issue further orders, injunctions or other relief while the matter is before the regulatory board or officer and shall terminate the suspension and bring the matter forward for trial if it finds (a) that proceedings before the regulatory board or officer are unreasonably delayed or otherwise unreasonably prejudicial

to the interests of a party before the court, or (b) that the regulatory board or officer has not taken final action within six months of the beginning of the order suspending proceedings under this chapter.

(8) Except as provided in section ten, recovering or failing to recover an award of damages or other relief in any administrative or judicial proceeding, except proceedings authorized by this section, by any person entitled to bring an action under this section, shall not constitute a bar to, or limitation upon relief authorized by this section.

Credits

Added by St.1969, c. 690. Amended by St.1970, c. 736, §§ 1, 2; St.1971, c. 241; St.1973, c. 939; St.1978, c. 478, §§ 45, 46; St.1979, c. 72, § 1; St.1979, c. 406, §§ 1, 2; St.1986, c. 557, § 90; [St.1987, c. 664, § 3](#); [St.1989, c. 580, § 1](#); [St.2004, c. 252, § 1, eff. Aug. 9, 2004](#).

[Notes of Decisions \(987\)](#)

M.G.L.A. 93A § 9, MA ST 93A § 9

Current through Chapter 75 of the 2015 1st Annual Session

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§501 • Infringement of copyright³

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

(e) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 119(a)(5), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station.

(f)(1) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 122, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local market of that station.

(2) A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station's rights under section 338(a) of the Communications Act of 1934.

§502 · Remedies for infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office.

§503 · Remedies for infringement: Impounding and disposition of infringing articles⁴

(a)(1) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable—

(A) of all copies or phonorecords claimed to have been made or used in violation of the exclusive right of the copyright owner;

(B) of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced; and

(C) of records documenting the manufacture, sale, or receipt of things involved in any such violation, provided that any records seized under this subparagraph shall be taken into the custody of the court.

(2) For impoundments of records ordered under paragraph (1)(C), the court shall enter an appropriate protective order with respect to discovery and use of any records or information that has been impounded. The protective order shall provide for appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in such records is not improperly disclosed or used.

(3) The relevant provisions of paragraphs (2) through (11) of section 34(d) of the Trademark Act (15 U.S.C. 1116(d)(2) through (11)) shall extend to any impoundment of records ordered under paragraph (1)(C) that is based upon an ex parte application, notwithstanding the provisions of rule 65 of the Federal Rules of Civil Procedure. Any references in paragraphs (2) through (11) of section 34(d) of the Trademark Act to section 32 of such Act shall be read as references to section 501 of this title, and references to use of a counterfeit mark in connection with the sale, offering for sale, or distribution of goods or services shall be read as references to infringement of a copyright.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

§504 · Remedies for infringement: Damages and profits⁵

(a) **IN GENERAL.** — Except as otherwise provided by this title, an infringer of copyright is liable for either —

- (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
- (2) statutory damages, as provided by subsection (c).

(b) **ACTUAL DAMAGES AND PROFITS.** — The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) **STATUTORY DAMAGES.** —

- (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are li-

able jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(3) (A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered willful infringement under this subsection.

(C) For purposes of this paragraph, the term “domain name” has the meaning given that term in section 45 of the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes” approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946”; 15 U.S.C. 1127).

(d) **ADDITIONAL DAMAGES IN CERTAIN CASES.** — In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that

the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

§505 · Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

§506 · Criminal offenses⁶

(a) CRIMINAL INFRINGEMENT. —

(1) IN GENERAL. — Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed —

(A) for purposes of commercial advantage or private financial gain;

(B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or

(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

(2) EVIDENCE. — For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement of a copyright.

(3) DEFINITION. — In this subsection, the term “work being prepared for commercial distribution” means —

(A) a computer program, a musical work, a motion picture or other audiovisual work, or a sound recording, if, at the time of unauthorized distribution —

(i) the copyright owner has a reasonable expectation of commercial distribution; and

(ii) the copies or phonorecords of the work have not been commercially distributed; or

(B) a motion picture, if, at the time of unauthorized distribution, the motion picture —

Massachusetts General Laws Annotated

Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)

Title I. Courts and Judicial Officers (Ch. 211-222)

Chapter 214. Equity Jurisdiction (Refs & Annos)

M.G.L.A. 214 § 3A

§ 3A. Unauthorized use of name, portrait or picture of a person; injunctive relief; damages; exceptions

Currentness

Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used such person's name, portrait or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him. Nothing in this section shall be so construed as to prevent any person practicing the profession of photography from exhibiting in or about his or its establishment specimens of the work of such person or establishment, unless the exhibiting of any such specimen is continued after written notice objecting thereto has been given by the person portrayed; and nothing in this section shall be so construed as to prevent any person from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by such manufacturer or dealer which such person has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with any literary, musical or artistic production of such author, composer or artist which such person has sold or disposed of with such name, portrait or picture used in connection therewith.

Credits

Added by St.1973, c. 1114, § 62.

Notes of Decisions (18)

M.G.L.A. 214 § 3A, MA ST 214 § 3A

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TITLE 9

Courts and Civil Procedure—Procedure Generally

CHAPTER 9-1

Causes of Action

SECTION 9-1-28

§ 9-1-28 Action for unauthorized use of name, portrait, or picture. – (a) Any person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent may bring an action in the superior court against the person so using his or her name, portrait, or picture to prevent and restrain the use thereof, and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used the person's name, portrait, or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him or her.

(b) Nothing in this section shall be so construed as to:

- (1) Apply to the use of names, portraits, or pictures in political speech or on matters of public concern;
- (2) Prevent any person practicing the profession of photography from exhibiting in or about his or her or its establishment specimens of the work of the person or establishment, unless the exhibiting of any such specimen is continued after written notice objecting to it has been given by the person portrayed; or
- (3) Prevent any person from using the name, portrait, or picture of any manufacturer or dealer in connection with the goods, wares, and merchandise manufactured, produced, or dealt in by the manufacturer or dealer which the person has sold or disposed of with the name, portrait, or picture used in connection therewith, or from using the name, portrait, or picture of any author, composer, or artist in connection with any literary, musical, or artistic production of the author, composer, or artist which the person has sold or disposed of with the name, portrait, or picture used in connection therewith.

History of Section.

(P.L. 1972, ch. 281, § 1; P.L. 2012, ch. 366, § 1; P.L. 2012, ch. 384, § 1.)